UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SERVICE EMPLOYEES INTERNATIONAL UNION HEALTHCARE PENNSYLVANIA, CTW, CLC, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	)	Case No. **18-1237**

PETITION FOR REVIEW OF DECISIONS AND ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

Pursuant to 29 U.S.C. §160(f) and Federal Rule of Appellate Procedure 15, SEIU Healthcare Pennsylvania CTW, CLC ("Petitioner") hereby petitions the Court for review of two decisions and orders of the National Labor Relations Board in the matter *UPMC and its Subsidiary, UPMC Presbyterian Shadyside, Single Employer, d/b/a/ UPMC Presbyterian Hospital and d/b/a/ UPMC Shadyside Hospital and SEIU Healthcare Pennsylvania*: (1) the decision and order of the National Labor Relations Board issued on December 11, 2017 and reported at 365 NLRB No. 153; and (2) the decisions and order of the National Labor Relations Board issued on

August 27, 2018 and reported at 366 NLRB No. 185. Copies of the decisions and orders are attached to this Petition as Exhibit A.

Respectfully submitted,

/s/ Nicole Berner

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CERTIFICATE OF SERVICE

I, the undersigned attorney for Petitioner Service Employees International Union Healthcare Pennsylvania, hereby certify that on this 5th day of September 2018 a true and correct copy of the foregoing Petition for Review of an Order for the National Labor Relations Board was served via first-class mail upon:

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EXHIBIT A

18-1237

UPMC and its subsidiary, UPMC Presbyterian Shadyside, single employer, d/b/a UPMC Presbyterian Hospital and d/b/a UPMC Shadyside Hospital and SEIU Healthcare Pennsylvania CTW, CLC. Cases 06–CA–102465, 06–CA–102494, 06–CA–102516, 06–CA–102518, 06–CA–102525, 06–CA–102534, 06–CA–102540, 06–CA–102542, 06–CA–102544, 06–CA–102555, 06–CA–102559, 06–CA–104090, 06–CA–104104, 06–CA–106636, 06–CA–107127, 06–CA–107431, 06–CA–107532, 06–CA–107896, 06–CA–108547, 06–CA–111578, and 06–CA–115826

December 11, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE, MCFERRAN, KAPLAN, AND EMANUEL

This dispute involves 22 different cases in which the General Counsel alleges that Respondent UPMC (UPMC) is a single employer together with its subsidiary, Respondent UPMC Presbyterian Shadyside (Presbyterian Shadyside). All of the disputed unfair labor practices were alleged to have been committed by Presbyterian Shadyside, and UPMC's disputed status as an alleged single employer would require extensive litigation, possibly taking many years to resolve, with no certainty as to outcome, and substantially delaying any final Board adjudication of the numerous alleged violations. However, there was a potentially promising development: UPMC agreed to resolve the disputed single-employer issue by offering to guarantee the performance of any remedies ultimately awarded against Presbyterian Shadyside. Administrative Law Judge Mark Carissimi accepted the offer, with modifications, over the objections of the General Counsel and Charging Party, both of whom filed exceptions to the judge's decision in this regard, which are before us now in the instant proceeding.[1]

In the interim, a divided Board, in *United States Postal Service*, 364 NLRB No. 116 (2016) (*Postal Service*), decided that judges are no longer permitted to accept a respondent's offered settlement terms, over the objection of the General Counsel and charging party or parties, unless the offer constitutes "a full remedy for all of the violations alleged in the complaint." Id., slip op. at 3.

We find, as did the judge, that UPMC's offer to act as guarantor of any remedies ultimately awarded against Presbyterian Shadyside effectuates the purposes of the National Labor Relations Act (NLRA or Act). Therefore, we find that the judge properly accepted the proffered terms in settlement of the single-employer allegation against UPMC.

Furthermore, we overrule *Postal Service*, and we agree with the dissenting views of Chairman (then-Member) Miscimarra in that case, who pointed out that *Postal Service* imposed an unacceptable constraint on the Board itself, which retained the right under prior law to review the reasonableness of any respondent's offered settlement terms that were accepted by the judge. We believe the "full remedy" standard adopted by the Board in *Postal Service* was an ill-advised and counterproductive departure from longstanding precedent. As illustrated by the instant case, adhering to the *Postal Service* standard would predictably cause incalculable delay in resolving the alleged violations, while potentially jeopardizing the prospect of obtaining *any* remedy against UPMC. Today, we return to the Board's prior practice of analyzing all settlement agreements, including consent settlement agreements, under the "reasonableness" standard set forth in *Independent Stave*, 287 NLRB 740 (1987).[2]

Background

The Amended Consolidated Complaint (Complaint) against UPMC and its subsidiary Presbyterian Shadyside issued in this matter on January 9, 2014, consolidating unfair labor practice allegations in 22 separate cases. In each of these 22 cases, Presbyterian Shadyside is alleged to be the culpable party. The Complaint's sole allegation against UPMC is that UPMC and Presbyterian Shadyside "are a single integrated business and a single employer within the meaning of the Act."

The hearing before Judge Carissimi began on February 12, 2014. Litigation of the single-employer allegation

[1] The judge issued the attached supplemental decision on July 31, 2015. The General Counsel and Charging Party each filed exceptions and a supporting brief, the Respondent filed an answering brief to the General Counsel's exceptions, and the General Counsel filed a reply brief. The Respondent filed a limited cross-exception and a supporting brief, and the General Counsel filed an answering brief. After considering the supplemental decision and the record in light of the exceptions, cross-exception, and briefs, we have decided, for the reasons stated in this opinion, to grant the Respondent's limited cross-exception, to modify the judge's recommended Order accordingly, and to affirm the judge's rulings, findings, and conclusions in all other respects.

[2] The Board has used various terms to describe settlement terms to which the respondent has agreed but the General Counsel and charging party or parties have not, including "consent order" and "unilateral settlement by consent order." See, e.g., *Lin Television Corp.*, 362 NLRB No. 197 (2015) (consent order); *Local 872*, 28-CB-118809, 2015 WL 153954 (Jan. 12, 2015) (unilateral settlement by consent order). We will refer to these as consent settlement agreements.

stalled over disputes regarding subpoenas issued by the General Counsel seeking documents allegedly relevant to that allegation. UPMC and Presbyterian Shadyside (collectively, the Respondents) petitioned to revoke the subpoenas. The judge denied the petitions in substantial part and ordered the Respondents to produce the subpoenaed documents. The Respondents refused to comply with the judge's order, and the General Counsel filed an application to enforce the subpoenas in federal district court. The court granted the General Counsel's application, and the Respondents appealed the district court's order to the Court of Appeals for the Third Circuit, where it remains pending.

After the General Counsel filed his application to enforce the subpoenas in federal district court, Judge Carissimi severed the single-employer allegation from the unfair labor practice allegations so as not "to delay [his] resolution of the substantive unfair labor practice issues in the complaint." The parties then proceeded to litigate the substantive unfair labor practice allegations against Presbyterian Shadyside over the course of a 19-day hearing, during which (according to the judge) "no evidence [was] presented . . . that UPMC independently committed any unfair labor practices." On November 14, 2014, the judge issued a 120-page decision, in which he found that Presbyterian Shadyside committed multiple violations of the Act. Exceptions to the judge's decision are pending before the Board. The single-employer allegation remained unlitigated and undecided.

On June 14, 2015, UPMC filed a Partial Motion to Dismiss, in which UPMC moved to dismiss the allegation that it constitutes a single employer with Presbyterian Shadyside. At the same time, UPMC offered to "guarantee the performance by Presbyterian Shadyside of any remedial aspects of the Administrative Law Judge's Decision and Order [that] survive the exceptions and appeal process." In its Partial Motion to Dismiss, UPMC further stated that it "would be responsible for any remedy along with Presbyterian Shadyside."

In a supplemental decision issued July 31, 2015 (Supplemental Decision), Judge Carissimi accepted UPMC's offer and granted the Partial Motion to Dismiss, reasoning as follows:

> UPMC is now proposing that the single employer allegation in the complaint be resolved on the basis that it guarantees compliance with any remedies the Board may issue regarding any unfair labor practices committed by Presbyterian Shadyside in the original decision in this case that is presently pending before the Board. It is important to note that the complaint does not allege that UPMC independently committed any of the unfair labor practices alleged in the complaint. In addition, there was no evidence presented at the trial that UPMC independently committed any unfair labor practices. Thus, any liability that UPCM [sic] would have for any of the unfair labor practices committed by Presbyterian Shadyside would be solely dependent upon a finding that it constitutes a single employer with Presbyterian Shadyside.
>
> In my view, accepting UPMC's offer to serve as a guarantor and ensure that Presbyterian Shadyside complies with any remedies provided for in a Board order is an appropriate way to resolve the single employer allegation. In accepting this offer, I will dismiss the allegation in the complaint that UPMC and Presbyterian Shadyside constitute a single employer, but I will retain UPMC as a party to the case in order to ensure that there is a mechanism to enforce, if necessary, its willingness to serve as a guarantor for any remedies ordered by the Board.
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> . . . . . .
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> Accepting UPMC's offer to serve as a guarantor of any remedy that the Board may ultimately order against Presbyterian Shadyside and providing UPMC do so pursuant to an order, in my view, is as effective a remedy as I would provide if I were to find UPMC and Presbyterian Shadyside to be a single employer and thus jointly and severally liable for the unfair labor practices I have found were committed by Presbyterian Shadyside.

Having accepted UPMC's offer, the judge dismissed the single-employer allegation.

The General Counsel and Charging Party filed exceptions to the Supplemental Decision, arguing that the judge erred by finding that UPMC's guarantee is as effective as the remedy that would result from a single-employer finding. Specifically, the General Counsel argues that acceptance of UPMC's guarantee deprives the General Counsel of a finding that UPMC is jointly and severally liable and, as such, directly liable for the unfair labor practices found in this proceeding.[3]

UPMC filed a limited exception to the Supplemental Decision, objecting to the wording of the judge's recommended Order. The Supplemental Decision's recommended Order binds UPMC's "officers, agents, successors, and assigns" in addition to UPMC. UPMC argues that the Order's reference to "officers, agents, suc-

[3] The General Counsel and the Union also contend that by accepting UPMC's offer, the judge improperly infringed on the General Counsel's prosecutorial discretion. The Union raised the same argument to the judge, who rejected it and explained why. For the reasons stated by the judge, we reject the General Counsel's and Union's contention.

cessors, and assigns" exceeds "the parameters of UPMC's guarantor proposal," and UPMC requests that the Order be modified to state only that UPMC shall act as a guarantor.

Discussion

A. The Board's Longstanding Policy Has Been to Accept Settlements That Are Reasonable.

Section 10(a) of the Act gives the Board "exclusive power to deal with unfair labor practices and to prescribe the appropriate remedy." *Borg-Warner Corp*, 121 NLRB 1492, 1495 (1958); see generally Section 10(a) of the Act (stating, in relevant part, that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise"). In exercising this power, "[t]he Board has long had a policy of encouraging the peaceful, nonlitigious resolution of disputes." *Independent Stave*, above at 741; see also *The Wallace Corporation v. NLRB*, 323 U.S. 248, 253–254 (1944) ("To prevent disputes like the one here involved, the Board has from the very beginning encouraged compromises and settlements.").

This policy has been pursued with great success. For example, in fiscal year 2016, 93 percent of meritorious unfair labor practice cases were settled.[4] This high rate of settlement assists the Board in effectuating the policies of the Act, both with regard to the settled cases themselves and by permitting the Agency to devote its limited resources to more intractable disputes, often involving nuanced or difficult issues of law. Nevertheless, settlement is not an end in itself. Precisely because Section 10(a) of the Act grants the Board exclusive jurisdiction to prevent unfair labor practices, the Board has the statutory authority to reject settlement agreements "at odds with the Act or the Board's policies." *Borg-Warner Corp*., above at 1495.

With this statutory responsibility in mind, the Board has traditionally considered a number of factors in reviewing settlement agreements to ensure they advance the policies of the Act, including "the risks involved in protracted litigation which may be lost in whole or in part, the early restoration of industrial harmony by making concessions, and the conservation of the Board's resources." *Farmers Co-operative Gin Assn.*, 168 NLRB 367, 367 (1967). "The determination of the appropriate remedy in unfair labor practice cases is a matter of administrative judgment reached after the Board has balanced all factors and equities in light of the policies of the Act." *Roselle Shoe Corp*., 135 NLRB 472, 475 (1962), enfd. 315 F.2d 41 (D.C. Cir. 1963). In determining whether to approve settlement agreements, "the discretion of the Board is recognized as broad." Id. In applying its broad discretion, the Board has regularly approved settlement agreements that provide remedies less than would be awarded if the General Counsel were to prevail on every allegation of the complaint. For example, in *Roselle Shoe Corp*., the Board weighed the alleged incompleteness of the proposed remedy—providing only $12,000 of the $80,000 in backpay that the union claimed was owed—against the "normal uncertainties of litigation" and concluded that the settlement was "appropriate and proper." Id. at 474–478.

In *Independent Stave*, the Board reiterated its longstanding, multi-factored approach to determining whether a settlement agreement is appropriate. It did so in part to correct what it viewed as a shift in Board law that overemphasized one factor at the expense of others: whether the proposed settlement "substantially remedied" all alleged violations. *Independent Stave*, above at 742. This shift was apparent in *Clear Haven Nursing Home*, 236 NLRB 853 (1978), reconsideration denied 239 NLRB 1244 (1979) (*Clear Haven*). In *Clear Haven*, the Board rejected, over a dissent, a proposed settlement as inadequate on the basis that it provided for reinstatement of strikers but without backpay. In *Independent Stave*, the Board sided with the *Clear Haven* dissenters and found that the majority in *Clear Haven* had "too narrow a focus" on whether the settlement provided a full remedy. *Independent Stave*, above at 742. The Board criticized this approach as based on the faulty presumption that "the General Counsel would prevail on *every* violation alleged in the complaint." Id. (emphasis in original). The Board emphasized that at the settlement stage of litigation, the NLRB "is confronted with only *alleged* violations of the Act." Id. (emphasis in original).

In *Independent Stave* the Board made clear that the "substantial remedy" factor was not to predominate over other factors. Instead, the Board stated, it would "evaluate the settlement in light of all factors present in the case to determine whether it will effectuate the purposes and policies of the Act to give effect to the settlement." Id. at 743. Although the Board observed that it was "impossible to anticipate each and every factor which will have relevance to [its] review" of proposed settlement terms, id., it identified several nonexhaustive factors relevant to making this determination:

[4] See National Labor Relations Board, FY 2016, Performance and Accountability Report, at 16, available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1674/15184%20NLRB%202016%20PAR_508.pdf. A "meritorious" unfair labor practice case is one in which the regional director decides to issue complaint.

> [I]n evaluating . . . settlements in order to assess whether the purposes and policies underlying the Act would be effectuated by our approving the agreement, the Board will examine all the surrounding circumstances including, but not limited to, (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

Id. Applying these factors, the Board found that the settlement in *Independent Stave* was "reasonable," even though, had the General Counsel been "fully successful" in litigating the unfair labor practice allegations, "the Charging Parties would have . . . been entitled to more backpay and the posting of a Board notice to employees." Id. at 743 fn. 17.

B. The Postal Service "Full Remedy" Standard Is Contrary to the Longstanding Board Policy of Approving All Settlements That the Board Finds Reasonable.

For nearly 30 years, the Board evaluated the reasonableness of all proposed settlement terms—including the proposed terms of consent settlement agreements—under the standard set forth in *Independent Stave*, above.[5] In *Postal Service*, above, a Board majority abruptly departed from this longstanding precedent, holding that "a proposed [consent] order protects the public interest and effectuates the purposes and policies of the Act only if it provides a full remedy for all of the violations alleged in the complaint." *Postal Service*, 364 NLRB No. 116, slip op. at 3. The *Postal Service* majority further stated: "In evaluating the completeness of the remedy, we will ask whether the proposed order includes all the relief that the aggrieved party would receive under the Board's established remedial practices were the case successfully litigated by the General Counsel to conclusion before the Board." Id.

We find that the Board majority in *Postal Service* adopted an ill-advised standard less likely to effectuate the purposes and policies of the Act than the Board's longstanding approach embodied in *Independent Stave*. As the instant case illustrates, adhering to the *Postal Service* standard would predictably cause incalculable delay in resolving the alleged violations in this case, while potentially jeopardizing the prospect of obtaining *any* remedy against UPMC.

For several reasons, we overrule *Postal Service* and return to the reasonableness standard articulated in *Independent Stave* when evaluating the terms of consent settlement agreements.

First and foremost, we find that it advances the purposes and policies of the Act to permit judges to accept settlement terms proffered by a respondent—even though the General Counsel and charging party or parties object to those terms—if the judge determines that the settlement is reasonable under *Independent Stave*, a determination that is subject to review by the Board. When a respondent offers to resolve disputed allegations based on terms that the judge *and* the Board deem reasonable under the circumstances, there is no valid reason for the Board to preclude such a resolution as a matter of law on the sole basis that the proffered terms include a less-than-full remedy, as *Postal Service* requires. Congress has granted the Board "exclusive power to deal with unfair labor practices and to prescribe the appropriate remedy." *Borg-Warner Corp*, above at 1495. To preclude the early resolution of Board litigation, on reasonable terms, simply because a party insists on a full remedy for all unfair labor practice allegations undermines the Board's interest in "encouraging voluntary dispute resolution, promoting industrial peace, conserving the resources of the Board, and serving the public interest." *Independent Stave*, above at 743. Conversely, these purposes are advanced by permitting the acceptance of settlement terms that are reasonable, notwithstanding opposition by the General Counsel and charging parties.

Second, the Board's acceptance of reasonable settlement terms may well be in the best interest of parties who object to a consent settlement agreement, especially where those parties are unreasonably discounting the

[5] See, e.g., *Local 872*, 28–CB–118809, 2015 WL 153954 (Jan. 12, 2015) (agreeing with the judge that the proposed "unilateral settlement by consent order" met the requirements of *Independent Stave*); *Heil Environmental*, 10–CA–114054 et al., 2014 WL 2812204 (June 20, 2014) (same); *Postal Service*, 20–CA–31171 (May 27, 2004) (approving under *Independent Stave* a unilateral settlement offer opposed by the General Counsel and the charging party); *Leprino Foods Co.*, 07–CB–43599 (Jan. 24, 2003) (same); *Caterpillar, Inc.*, 33–CA–10164 (May 13, 1996) (same); *Propoco, Inc., d/b/a Professional Services*, 2–CA–27013 (June 26, 1995) (same); see also *Lin Television Corp.*, 362 NLRB No. 197 (2015) (setting aside "consent order" as it did not meet requirements of *Independent Stave*); *Enclosure Suppliers, LLC*, 09–CA–046169, 2011 WL 2837659 (July 14, 2011) (same); *Sea Jet Trucking Corp.*, 327 NLRB 540, 550 (1999) (setting aside unilateral settlement proposed by the respondent over the General Counsel's and charging party's objection as it did not satisfy *Independent Stave* requirements); *Iron Workers Local 27 (Morrison-Knudson)*, 313 NLRB 215, 217 (1993) (same); *Food Lion, Inc.*, 304 NLRB 602, 602 fn. 4 (1991) (same). These cases demonstrate that the Board can adequately evaluate the proposed terms of consent settlement agreements under *Independent Stave*, and reject, where appropriate, settlements that do not effectuate the purposes and policies of the Act.

risks associated with litigation. As the Board stated in *Independent Stave*:

> At this stage of the litigation we are confronted only with *alleged* violations of the Act. Even though the allegations in the complaint issued after the Region's investigation and determination that reasonable cause exists to believe the allegations occurred, a charging party's right to a [full] remedy can be enforced, upon the authority of the Government, only after an adjudication. In addition, there are risks inherent in litigation. For example, witnesses may be unavailable or uncooperative; procedural delays may occur; the issues may be complex or novel; supporting documentation may have been destroyed or lost; and credibility resolutions may have to be made by the administrative law judge. By operating on a rigid requirement that the settlement must mirror a full remedy, we would be ignoring the realities of litigation.

Independent Stave, above at 742–743 (emphasis in original). The *Postal Service* majority's apparent belief that a "full remedy" standard will lead to consistently better outcomes for the General Counsel and charging parties than a "reasonableness" standard rested on the faulty assumption that the General Counsel is sure to prevail. Experience teaches the contrary lesson. Litigation is never certain. It is never certain that the General Counsel will prevail on any complaint allegation, let alone all of them. The Act entrusts the Board with the prevention of unfair labor practices, and the Board should use its statutory authority to approve settlement agreements that are reasonable, even over the opposition of the General Counsel and charging party.

Third, as noted previously, by refusing to approve less-than-full-remedy consent settlement agreements that are nonetheless reasonable, the majority opinion in *Postal Service* tied the hands not only of administrative judges but also of the Board itself. Again, it is the Board's adjudicatory duty, not that of the prosecuting General Counsel and certainly not that of the charging party, to make the final determination that settlement terms are reasonable. Congress entrusted the Board with the responsibility to apply the Act to the "complexities of industrial life,"[6] and in carrying out its responsibility, the Board should trust itself to do what is reasonable. It does not effectuate the purposes of the Act to craft unacceptable restraints on the Board's ability to make that final judgment.

Fourth, reasonable settlement terms reached at an early stage—even if the terms are less than complete—will often leave parties in a better position than would result from a Board adjudication, considering the substantial burdens and time involved in Board proceedings. The nature of Board litigation often entails substantial delay before disputed unfair labor practice allegations are resolved. Our procedures require the filing of a charge that is investigated by one of the Board's Regional Offices, which decides whether to issue a complaint, which is followed by a hearing before an administrative law judge, with posthearing briefing in most cases. After the judge issues a decision, parties have the right to file exceptions with the Board, which typically are supported by another round of briefs, and the Board renders a decision, which can be followed by court appeals. When the Board has found a violation and has ordered backpay and other remedial measures, there are additional compliance proceedings handled by the Board's Regional Offices, which can result in additional hearings before administrative law judges, additional posthearing briefs, supplemental decisions by the judges, and further appeals to the Board and the courts. In spite of everyone's best efforts, this lengthy litigation process consumes substantial time and, too often, causes unacceptable delays before any Board-ordered relief becomes available to the parties.[7]

Finally, we overrule *Postal Service* because it rests on faulty premises. The majority in *Postal Service* incorrectly stated that by adopting a "full remedy" standard for evaluating consent settlement agreements, the Board was returning "to the standard originally adopted by the Board" in *Local 201, Electronic Workers (General Electric)*, 188 NLRB 855 (1971).[8] In *General Electric*, contrary to the Board majority's claim in *Postal Service*, the Board did not "adopt[] the trial examiner's recommendation to approve the proposed order *on the ground that* it provided a full remedy for all the violations alleged in

[6] *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963); see also *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266–267 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.").

[7] Cases may involve years of Board litigation and dozens or even hundreds of employee-claimants. For example, the dispute in *CNN America, Inc.*, 361 NLRB No. 47 (2014)—involving approximately 300 employee-claimants—required 82 days of hearings, more than 1,300 exhibits, more than 16,000 pages of transcript, and more than 10 years of Board litigation. Furthermore, the recent decision by the Court of Appeals for the District of Columbia Circuit, denying in part the Board's cross-application for enforcement of its order, leaves open the possibility that litigation will continue before the Board on remand. *NLRB v. CNN America, Inc.*, 865 F.3d 740 (D.C. Cir. 2017). Another case being pursued by the General Counsel involves consolidated claims against McDonald's USA, LLC, and 31 other employer parties, based on 61 unfair labor practice charges filed in six NLRB regions alleging 181 unfair labor practices involving employees at 30 restaurant locations. See, e.g., *McDonald's USA, LLC*, 363 NLRB No. 91 (2016). Should it proceed all the way to finality, the *McDonald's* litigation could last for decades.

[8] *Postal Service*, above, slip op. at 1.

the complaint." *Postal Service*, above, slip op. at 1–2 (emphasis added). Rather, the trial examiner recommended approving a consent settlement agreement that provided a full remedy, and the Board adopted the trial examiner's recommendation. *General Electric*, above at 855. The Board did not say that it was adopting the recommendation "on the ground that" the proposed order provided a full remedy. The Board did not say it would *only* approve consent settlement agreements that provide a full remedy. Nor can a "full remedy" standard be inferred from the *General Electric* decision. Merely because the Board in *General Electric* approved a consent settlement agreement that provided a full remedy, it does not follow that it would have *rejected* a consent settlement agreement that provided less than a full remedy. As Chairman (then-Member) Miscimarra noted in his *Postal Service* dissent, "a high jumper that clears the bar by a foot would also clear it if he had jumped 6 inches lower."[9] In short, the majority in *Postal Service* did not return Board law "to the standard originally adopted by the Board." Id., slip op. at 1. Rather, the *Postal Service* majority announced a brand-new "full remedy" standard for consent settlement agreements.

Prior to *Postal Service*, the Board consistently applied the *Independent Stave* standard to consent settlement agreements.[10] Indeed, *Independent Stave* itself demonstrates that the Board intended to apply a "reasonableness" standard to all types of voluntary dispute resolution by settlement agreement, including when the proposed terms are opposed by the charging party or parties and/or the General Counsel. Under the first *Independent Stave* factor, the Board asks "whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound," and it also considers "the position taken by the General Counsel regarding the settlement." *Independent Stave*, above at 743. Thus, the Board in *Independent Stave* clearly anticipated that unanimous agreement is not required for a settlement agreement to be approved. It is true that the Board in *Independent Stave* noted that certain charging parties had accepted the settlement, and the Board, in approving the settlement, was therefore "honoring the parties' agreements" by eliminating risks the parties "have decided to avoid." Id.[11] However, as the Board has tacitly recognized by applying *Independent Stave* in evaluating consent settlement agreements, the facts of that case do not constitute a holding that the agreement of the charging party or parties is prerequisite to acceptance of a proposed settlement. Rather, the test is the reasonableness of the proposed settlement under the circumstances, and whether all or even any parties (besides the charged party) consent to the agreement is merely one among several relevant factors the Board must consider in determining whether the settlement is reasonable and should be accepted.

For all of the foregoing reasons, we overrule the Board's decision in *Postal Service*, above, we reject the "full remedy" standard for evaluating consent settlement agreements, and we return to applying the "reasonableness" standard set forth in *Independent Stave* to evaluate such agreements.

C. The "Guarantor" Status Offered by UPMC Is Reasonable Under Independent Stave, and Accepting the Offer Effectuates the Purposes and Policies of the Act.

When the Board announces a new standard, a threshold question is whether the new standard may appropriately be applied retroactively, or whether it should only be applied in future cases. In this regard, "[t]he Board's usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage.'" *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006-1007 (1958)). Yet, the Supreme Court has indicated that "the propriety of retroactive application is determined by balancing any ill effects of retroactivity against 'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'" Id. (quoting *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

Applying the Supreme Court's balancing test, we believe it is appropriate to apply the standard we announce today retroactively to the instant case and to all other pending cases. We do not believe retroactivity will produce any "ill effects." Although the "reasonableness" standard may result in the acceptance of reasonable settlement terms that are somewhat less than what would result if the General Counsel prevailed on every allegation of the complaint after litigating the case to completion, this does not constitute a material disadvantage given the other considerations referenced above. As we have explained, the General Counsel and charging parties who reject settlement terms on the sole basis that they do not represent a full remedy for all alleged violations still stand to benefit from today's decision, which again makes it possible for parties to obtain a reasonable outcome on terms that are available much more quickly than would be the case if the parties were to await the conclusion of litigation. And the certainty of that outcome also

[9] *Postal Service*, above, slip op. at 5 (Member Miscimarra, dissenting).

[10] See above fn. 5.

[11] Contrary to Member Pearce's assertion, we do not conveniently omit *Independent Stave*'s language regarding "honoring the parties' agreements." Rather, we read it in context.

enables parties to avoid the risk that, after enduring the costs and delays of litigation, the outcome (from the perspective of the General Counsel and charging parties) may be no better than, or even worse than, the proffered settlement terms they unreasonably opposed.

Moreover, failing to apply the new standard retroactively would "produc[e] a result which is contrary to a statutory design or to legal and equitable principles." *SEC v. Chenery Corp.*, above. The Act grants the Board "exclusive power to deal with unfair labor practices and to prescribe the appropriate remedy," *Borg-Warner Corp*, above at 1495, and by returning to a "reasonableness" standard to evaluate consent settlement agreements, the Board resumes the full exercise of its exclusive power by restoring to itself the discretion to approve such agreements over the unreasonable opposition of the General Counsel and charging party or parties. Moreover, the standard we return to today "encourage[s] voluntary dispute resolution, promot[es] industrial peace, conserv[es] the resources of the Board, and serv[es] the public interest." *Independent Stave*, above at 743. Accordingly, we find that application of our new standard in this and all pending cases will not work a "manifest injustice." *SNE Enterprises*, above. We proceed to do so now.

In his underlying decision, the judge addressed every allegation in this matter except for the lone allegation against UPMC—i.e., that UPMC is a single employer with Presbyterian Shadyside. Single-employer status does not, standing alone, constitute an unfair labor practice. Indeed, the judge found "there was no evidence presented at the trial that UPMC independently committed any unfair labor practices." Rather, if the Board determines that one entity (here, UPMC) is a single employer with a second entity (here, Presbyterian Shadyside), this provides a backup party—or a potential alternate party—that is responsible for providing whatever relief is ultimately ordered. In other words, when a parent company is found to be a single employer with its subsidiary, the parent company is liable for the subsidiary's unfair labor practices "to the same extent" as the subsidiary. *Flat Dog Productions, Inc.*, 347 NLRB 1180, 1182 (2006).

This outcome is effectively what UPMC is offering. Without further litigation, UPMC agrees to render itself liable to the same extent as Presbyterian Shadyside. In its Partial Motion to Dismiss, UPMC offered to "guarantee the performance by Presbyterian Shadyside of any remedial aspects of the Decision and Order which survive the exceptions and the appeal process." In its reply to the General Counsel's and Charging Party's exceptions to the motion, UPMC again stated that it "guarantees the performance by Presbyterian Shadyside of any remedial aspects of the Administrative Law Judge's Decision and Order which survive the exceptions and appeal process. As such, UPMC would be responsible for any remedy along with Presbyterian Shadyside."

UPMC's offer constitutes the type of consent settlement agreement—an agreement opposed by the General Counsel and Charging Party—that the Board in *Postal Service* held must never be accepted by the judge unless the proffered terms constitute "a full remedy for all of the violations alleged in the complaint."[12] As stated above, however, we overrule *Postal Service*. Having done so, we instead evaluate the terms of the consent settlement agreement under *Independent Stave*. Thus, the Board examines all the surrounding circumstances to determine whether the settlement is reasonable, which includes evaluating the following factors:

> (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

273 NLRB at 743.

The first *Independent Stave* factor is not conclusive: UPMC has agreed to be bound by its proposed "guarantor" status, but the General Counsel and Charging Party Union oppose resolving the single-employer allegation on this basis. The General Counsel's opposition "is an important consideration weighing against approval," but it is not determinative under *Independent Stave*. *McKenzie-Willamette Medical Center*, 361 NLRB No. 7, slip op. at 2 (2014); see also *Iron Workers Local 27 (Morrison-Knudson)*, 313 NLRB at 217 (stating "it is clear" that the opposition of the General Counsel and the charging party "is not the decisive factor to be weighed"); *Sea Jet Trucking Corp.*, 327 NLRB at 550 (same).

Independent Stave factors 3 and 4 favor approval of UPMC's proposed remedial guarantee: there are no allegations of fraud, coercion, or duress, and there is no evidence that UPMC has a history of violating the Act or

[12] *Postal Service*, above, slip op. at 3.

has breached previous settlement agreements resolving unfair labor practice disputes.[13]

Finally, we find that the "reasonableness" factor—factor 2—favors approving the settlement, and this is the most important consideration when evaluating a consent settlement agreement. For the reasons explained below, we find UPMC's proposed remedial guarantee is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation, and we conclude that the General Counsel's and Charging Party's opposition to accepting UPMC's offer is outweighed by countervailing factors that warrant accepting the remedial guarantee and dismissing the single-employer allegation.

First, as the judge correctly found, UPMC's remedial guarantee is as effective as a finding of single-employer status. As noted above, when a parent company is found to be a single employer with its subsidiary, the parent company is liable for the subsidiary's unfair labor practices to the same extent as the subsidiary. The practical aim of the General Counsel's single-employer allegation in this matter, then, is to hold UPMC responsible for Presbyterian Shadyside's unfair labor practices along with Presbyterian Shadyside. UPMC's remedial guarantee achieves that aim. UPMC has offered to "guarantee the remediation of any violation" found in this case, adding that "as a guarantor, UPMC is liable for Presbyterian Shadyside's compliance with *any remedy ordered* and to the extent Presbyterian Shadyside *fails* to remediate any unfair labor practices on its own, UPMC must take *any necessary action* to ensure compliance" (emphasis added). In short—and in its own words—"UPMC would be responsible for any remedy along with Presbyterian Shadyside," just as UPMC would be were single-employer status established. Thus, the judge correctly found that UPMC's offer to guarantee Presbyterian Shadyside's performance of its remedial obligations provides a remedy "as effective as" a finding of single-employer status.[14]

Second, UPMC's remedial guarantee is reasonable in light of the circumstance that Presbyterian Shadyside, not UPMC, is the alleged wrongdoer here. In its exceptions, the General Counsel argues that a single-employer finding is necessary because it would render UPMC jointly and severally liable with Presbyterian Shadyside. Joint and several liability, the General Counsel argues, would allow the General Counsel to hold UPMC primarily and directly liable for any remedial failure, i.e., the General Counsel could institute contempt proceedings directly against UPMC for UPMC's failure to comply with the Board's Order. The General Counsel's insistence on joint and several liability might carry more weight if the General Counsel had alleged that UPMC had violated the Act in any way. There was no such allegation, and a 19-day hearing that resulted in a 120-page decision pro-

[13] Although UPMC subsidiaries, including Presbyterian Shadyside, have been found to violate the Act, this does not weigh against acceptance of UPMC's guarantee. In that case, as here, there was no allegation "that UPMC, as a separate entity, committed unfair labor practices." *UPMC*, 362 NLRB No. 191, slip op. at 1 fn. 2 (2015).

[14] Having accepted UPMC's remedial guarantee offer, the judge in his Supplemental Decision ordered that "UPMC, its officers, agents, successors, and assigns, shall be the guarantor of any remedies that the Board may order in the original decision in this case." UPMC has excepted to the inclusion of the "officers, agents, successors, and assigns" language on the ground that it was not included in UPMC's offer. We grant the cross-exception on that basis.

The omission of this language does not render UPMC's remedial guarantee unacceptable under *Independent Stave*. UPMC's offered "guarantor" status remains reasonable and sufficient to resolve the disputed single-employer allegation here, because the record reveals that both UPMC and Presbyterian Shadyside are stable corporate entities with substantial assets. Moreover, we agree with counsel for the General Counsel's statement in the General Counsel's Answering Brief in Opposition to Respondent UPMC's Exception that removal of the language "would change nothing from a legal standpoint" (Opposition p. 3). Under Supreme Court precedent and Federal Rule of Civil Procedure 65(d)(2)(b) and (c), our Order against UPMC is binding against its officers, agents, successors, and assigns to the extent those parties would be bound under the Federal Rules of Civil Procedure, regardless of whether the Order specifically includes such language. In *Regal Knitwear v. NLRB*, 324 U.S. 9 (1945), the Supreme Court addressed an employer's objection to the Board's addition of "officers, agents, successors and assigns" to its cease-and-desist order against the employer. The Court called the controversy "abstract" because the employer merely objected to the words of the order; the Board was "not attempting to reach or hold anyone in contempt by virtue of such orders," and no successor or assign appeared before the Court "complaining that these words put him in jeopardy." Id. at 15–16. The Court held that contempt liability against a successor or assign does not hinge on the inclusion of the words "successors or assigns" in the order itself, but upon a "concrete set of facts" demonstrated at a "judicial hearing." Id. at 16. Thus, although *Regal Knitwear* indicates that a court has the authority to make a Board order binding against a respondent's officers, agents, successors, and assigns, that is not the end of the analysis, at least as to successors or assigns. "Rather, the court must [then] look to the actual relationship between the persons enjoined and their 'successors and assigns,' and if the relationship qualifies [under Rule 65(d)], third persons will be bound by the injunction whether or not the order specifically refers to successors and assigns." 11A Charles Alan Wright, Arthur R. Miller, et al., Federal Practice & Procedure § 2956, Westlaw (database updated Apr. 2017).

We further modify the judge's recommended Order in one additional respect. The judge stated that UPMC, as guarantor, "must ensure that Respondent UPMC Presbyterian Shadyside takes all steps necessary to comply with any remedies that may be contained in the Board's Order, including providing for any such remedies itself, if UPMC Presbyterian Shadyside *is unable* to do so" (emphasis added). We shall substitute the word "fails" for the italicized phrase to better reflect UPMC's guarantee. See UPMC's Answering Brief in Opposition to Counsel for the General Counsel's Exceptions to the Administrative Law Judge's Supplemental Decision, p. 6 ("[T]o the extent Presbyterian Shadyside *fails to* remediate any unfair labor practices on its own, UPMC must take any necessary action to ensure compliance" (emphasis added).).

duced no evidence that UPMC had independently committed a single unfair labor practice. Rather, all of the violations found by the judge involved Presbyterian Shadyside. Presbyterian Shadyside *should* be primarily responsible to remedy its own violations of the Act, and UPMC has reasonably offered to guarantee that Presbyterian Shadyside will do just that.[15]

Third, UPMC's remedial guarantee is reasonable in light of the risks inherent in litigating single-employer status and the stage of the litigation. Accepting UPMC's offer would remove the risk to the Charging Party Union and the alleged discriminatees that UPMC would *not* be found a single employer with Presbyterian Shadyside and thus would not bear *any* responsibility for Presbyterian Shadyside's compliance with the Board's ultimate order. If the Board rejects UPMC's offer, UPMC *may or may not* be found jointly and severally liable for any unfair labor practices committed by Presbyterian Shadyside. If the Board accepts UPMC's offer, UPMC *will* be responsible for Presbyterian Shadyside's performance of any remedies the Board orders. Rejecting UPMC's offer runs the risk that UPMC will not have any liability for Presbyterian Shadyside's unfair labor practices.

Finally, accepting UPMC's offer also greatly expedites the resolution of this proceeding. Barring settlement somewhere along the way, a long road stretches ahead for litigating and deciding the single-employer allegation. Since the subpoena enforcement dispute pending before the Third Circuit concerns documents potentially relevant to single-employer status, the parties must first await the Third Circuit's resolution of that dispute. Assuming the Third Circuit upholds the district court's decision, UPMC will comply with the subpoena, and a hearing on single-employer status will follow. Based on his knowledge of the case, Judge Carissimi estimated that such a hearing would take 4 or 5 days. As bad luck would have it (although the judge might disagree with that assessment), Judge Carissimi has retired, so another judge—one unfamiliar with the case—would conduct any further necessary hearings in this matter. See Section 102.36 of the Board's Rules and Regulations. This new judge will then draft a decision explaining why UPMC and Presbyterian Shadyside do or do not constitute a single employer. Any party may then file exceptions to this decision with the Board. The Board would then review the judge's decision and the record in light of the exceptions and the parties' briefs and issue a decision in the fullness of time. The Board's decision, of course, may not be the end of the matter, as a party might appeal the Board's determination to a federal court of appeals. This process could take years, and the outcome is anything but certain. Accepting UPMC's remedial guarantee offer would eliminate both the delay and the uncertainty.

[15] As stated above, Judge Carissimi's decision and recommended order are pending before the Board on exceptions. The Board does not prejudge the merits of this matter.

D. Response to the Dissents of Members Pearce and McFerran

Our colleagues' respective dissents present as long-settled Board law a false dichotomy that could not possibly have existed prior to the Board's decision in *Postal Service* little over a year ago. In particular, Member McFerran incorrectly claims that "[u]ntil today, the Board had two basic frameworks" for the evaluation of settlement agreements: *Independent Stave* where the settlement was a "true settlement," and *Postal Service* for consent settlement agreements. Not so. *Postal Service* issued barely more than one year ago, and the cases cited above in footnote 5 demonstrate that for three decades prior to *Postal Service*, the Board evaluated consent settlement agreements under *Independent Stave*. Indeed, by including as a relevant factor the position of the parties as to the settlement, *Independent Stave* itself clearly indicates that it applies to settlements where the General Counsel and/or the charging party objects. Above, we discuss at length why *Postal Service* constituted an unwarranted departure from precedent. It is no surprise that such an ill-advised approach has not long been the policy of the Board.

We may quickly dispense with a few additional objections raised by our dissenting colleagues. First, citing *UFCW, Local No. 1996 (Visiting Nurse Health System, Inc.)*, 338 NLRB 1074, 1074 (2003), Member McFerran asserts that "[a] change in the Board's composition is not a basis for revisiting an earlier decision." The cited case is inapposite: *Visiting Nurse Health System* concerned a motion for reconsideration. In *Visiting Nurse Health System*, the Board rejected the charging party's argument that a change in the Board's composition constituted "extraordinary circumstances" warranting reconsideration of the prior Board's decision in the same case. No such argument has been made by the parties in the present case, which is not before the Board on a motion for reconsideration and therefore is not governed by the "extraordinary circumstances" standard. See Sec. 102.48 of the Board's Rules. Furthermore, Member McFerran's assertion to the contrary notwithstanding, "[i]t is a fact of life in NLRB lore" that the Board's interpretation of the Act will "invariably fluctuate with the changing compositions of the Board." *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1097 (D.C. Cir. 2001). Congress created the Board with five members whose

terms are staggered so that a different member's term expires every year, and the Board in recent years has exhibited no reluctance to modify well-established principles involving many of the most fundamental aspects of the Act. Our decision today reflects a reasoned evaluation of the modification a previous Board majority made in *Postal Service*. As explained above, and consistent with the views expressed by one Board member in that case,[16] we believe the majority's decision in *Postal Service* improperly deviated from policies favoring the appropriate settlement of disputed allegations. This is especially true given that under the preexisting standard, set forth in *Independent Stave*, settlements approved by regional directors or administrative law judges remain subject to review by the Board. Therefore, we overrule *Postal Service* for the reasons expressed above.

Second, contrary to our dissenting colleagues' assertions, the proper standard for assessing consent settlement agreements *is* at issue in this matter. UPMC's offer to guarantee Presbyterian Shadyside's compliance with any remedies the Board may order shares the key characteristics of a consent settlement agreement. Namely, Respondent UPMC has offered to resolve the single-employer allegation against it pursuant to terms that the judge found acceptable over the objections of the Charging Party and the General Counsel. The evaluation of a proffered settlement to which the General Counsel and charging party object falls squarely within the purview of *Postal Service*. Even though our dissenting colleagues claim not to see how the standard for consent settlement agreements might be at issue here, the General Counsel and Charging Party see it plainly enough. In his brief on exceptions to the judge's decision to accept UPMC's guarantee, the General Counsel, writing before the Board's decision in *Postal Service*, argued that the guarantee did not meet the Board's requirements for consent settlement agreements as set forth in *Independent Stave*. Furthermore, after the issuance of *Postal Service* by the Board, the Charging Party wrote "to advise the Board of a recent decision" that, in its view, supported its exceptions to the judge's order. In its letter, the Charging Party highlighted the similarities between *Postal Service* and the present matter, specifically noting that *Postal Service* and the judge's order "both involve an ALJ's adoption of an order incorporating a respondent's settlement offer over the objections of the charging party and the General Counsel to dispose of complaint allegations in a manner that did not fully remedy the violations alleged in the complaint."

Third, Member McFerran argues that UPMC's guarantee "resolves nothing" because it is contingent on the outcome of the case against Presbyterian Shadyside. But that would be true even if the Board found that UPMC and Presbyterian Shadyside were a single employer. In either situation, Presbyterian Shadyside would be free to challenge the judge's unfair labor practice findings before the Board and in the court of appeals, UPMC would be free to assist it in doing so, and neither entity would be required to remedy any violations until a Board order finding those violations had been enforced by the court of appeals.

Fourth and finally, Member McFerran faults us for not inviting outside briefing. Neither the Act, the Board's Rules, nor the Administrative Procedures Act requires the Board to invite amicus briefing before reconsidering precedent. The decision to allow such briefing is purely discretionary and is based on the circumstances of each case. In the case at hand, the Board is correcting a recent, ill-advised deviation from longstanding precedent. Moreover, the Board requested briefing in *Postal Service* last year, and interested parties weighed in at that time. Thus, the competing arguments have been made already and recently at that, and there is no reason to believe they have changed in the interim.

Furthermore, we respectfully disagree with Member McFerran's statement that the Board maintains a "routine practice" to issue a notice and invitation to file amicus briefs in "significant cases, particularly those where the Board is contemplating reversal of precedent." In the past decade, the Board has freely overruled or disregarded established precedent in numerous cases without supplemental briefing. See, e.g., *E.I. Du Pont de Nemours*, 364 NLRB No. 113 (2016) (overruling 12-year-old precedent in *Courier-Journal*, 342 NLRB 1093 (2004), and 52-year-old precedent in *Shell Oil Co.*, 149 NLRB 283 (1964), without inviting briefing); *Graymont PA, Inc.*, 364 NLRB No. 37 (2016) (overruling 9-year-old precedent in *Raley's Supermarkets & Drug Centers*, 349 NLRB 26 (2007), without inviting briefing); *Loomis Armored U.S., Inc.*, 364 NLRB No. 23 (2016) (overruling 32-year-old precedent in *Wells Fargo Corp.*, 270 NLRB 787 (1984), without inviting briefing); *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015) (overruling 53-year-old precedent in *Bethlehem Steel*, 136 NLRB 1500 (1962), without inviting briefing); *Pressroom Cleaners*, 361 NLRB 643 (2014) (overruling 8-year-old precedent in *Planned Building Services*, 347 NLRB 670 (2006), without inviting briefing); and *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014) (overruling 10-year-old precedent in *Holling Press*, 343 NLRB 301 (2004), without inviting briefing).

[16] *Postal Service*, 364 NLRB No. 116, slip op. at 4–8 (Member Miscimarra, dissenting).

For all these reasons, we find that UPMC's proposed remedial guarantee in exchange for the dismissal of the single-employer allegation against UPMC is reasonable, and we approve it.

REMEDY

We shall order that the single-employer allegation in the Complaint be dismissed, but we shall retain UPMC as a party for the purpose of ensuring enforcement of UPMC's guarantee of the remedies, if any, ultimately ordered against Presbyterian Shadyside.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge in his Supplemental Decision as modified below and orders that the Respondent, UPMC, Pittsburgh, Pennsylvania, shall take the action set forth in the Order as modified. The single-employer allegation in the Complaint is hereby dismissed, provided, however, that UPMC is retained as a party for the purpose indicated in the Remedy section, above.

The recommended Order is modified as follows: delete the words "officers, agents, successors, and assigns," and substitute the word "fails" for the words "is unable." Thus, UPMC, as guarantor, "must ensure that Respondent UPMC Presbyterian Shadyside takes all steps necessary to comply with any remedies that may be contained in the Board's Order, including providing for any such remedies itself, if UPMC Presbyterian Shadyside *fails* to do so" (emphasis added).

Dated, Washington, D.C. December 11, 2017

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Philip A. Miscimarra, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER PEARCE, dissenting.

What we have here is a classic case of an answer in search of a question. The sole issue presented is whether the judge correctly dismissed the complaint allegation that UPMC and its subsidiary, Presbyterian Shadyside, constitute a single employer, based on UPMC's offer to serve as a guarantor of any remedies ultimately ordered against Presbyterian Shadyside. As discussed below, the judge clearly erred in concluding that UPMC's guarantee was as effective a remedy as one that would result from a single-employer finding. Nonetheless, rather than address this issue, the newly-minted majority has substituted another issue—more to its liking—as a stratagem to reverse Board precedent. Specifically, the majority reaches out to overrule *Postal Service*, 364 NLRB No. 116 (2016), in which the Board clarified the appropriate standard for evaluating "consent" orders—and from which then-Member Miscimarra vigorously dissented, even though this case does not involve a consent order. Although I am not surprised by my colleagues' eleventh hour efforts, I strongly disagree with their decision to reverse precedent that is irrelevant to the disposition of this case and which neither the judge nor the parties addressed.[1]

Background

The General Counsel issued a complaint in this proceeding alleging that UPMC and Presbyterian Shadyside, as a single employer, engaged in extensive unfair labor practices in response to the Union's attempt to organize their nonclinical support employees. Prior to the unfair labor practice hearing, UPMC filed a motion to dismiss the single-employer allegation, which the Board denied. During the hearing, the judge denied UPMC's petitions to revoke subpoenas seeking documents relating to the single-employer allegation, and when UPMC persisted in its refusal to produce the documents, the judge severed that allegation from the remainder of the case, while the parties litigated the subpoena enforcement issue in federal court. Thereafter, the judge issued a decision finding that Presbyterian Shadyside committed more than 20 violations of Section 8(a)(1), (2), (3), and (4) of the Act.

While UPMC was continuing to contest its obligation to comply with the subpoenas pertaining to the single-employer allegation before the Third Circuit Court of Appeals, it also sought to avoid litigating the issue altogether by filing a "Partial Motion to Dismiss" with the judge. In that motion, UPMC asserted that it would not effectuate the purposes of the Act to proceed with UPMC as a party since no remedy was sought from it. UPMC further argued that, in any event, dismissal was appropriate because it was willing to "guarantee the performance by Presbyterian Shadyside of any remedial aspects of the Decision and Order which survive the exceptions and appeal process." The General Counsel and the Charging

[1] Although Member McFerran and I write separately, I fully endorse the points raised in her dissent which persuasively demonstrate the majority's erroneous decision.

Party strongly opposed the Respondent's motion. They argued that dismissal was inappropriate because the General Counsel had not yet had the opportunity to present evidence in support of the single-employer allegation and that a litigated single-employer finding was necessary to achieve complete remedial relief and effectuate the policies of the Act.

Without holding a hearing on the single-employer allegation, the judge issued a supplemental decision granting UPMC's motion. The judge found that UPMC's guarantee was "as effective" as any remedy that would result from a single-employer finding, and ordered that "UPMC, its officers, agents, successors, and assigns, shall be the guarantor of any remedies that the Board may order" and, as the guarantor, UPMC "must ensure that . . . Presbyterian Shadyside takes all steps necessary to comply with any remedies that may be contained in the Board's Order, including providing for any such remedies itself, if . . . Presbyterian Shadyside is unable to do so."

UPMC excepts to the judge's supplemental decision, arguing that the judge's "officers, agents, successors, and assigns" language was not part of its guarantee, and must be struck. The General Counsel and the Charging Party also except, arguing that the judge erred in finding that "UPMC's offer to serve as a guarantor of any Board Order issued in this matter constitutes a remedy as effective as any remedy resulting from a finding that . . . UPMC and . . . Presbyterian Shadyside constitute a single employer." I agree with the General Counsel and Charging Party. Had the judge thoroughly analyzed and compared the remedies, he would have found the guarantee wholly inadequate.

Discussion

1. UPMC's guarantee is not as effective as the remedy that would result from a litigated single-employer finding.

Both the judge and the majority make the same error when they assert that UPMC's guarantee is "as effective" as the remedy that would result from a single-employer finding. If UPMC and Presbyterian Shadyside were found to be a single employer, the Board's Order would hold them both jointly and severally liable for the unfair labor practices committed by Presbyterian Shadyside. See *Bolivar-Tees, Inc.*, 349 NLRB 720, 722 (2007) (because "single-employer status exists . . . we will hold all four businesses jointly and severally liable to remedy the unfair labor practices found"), enfd. 551 F.3d 722, 733 (8th Cir. 2008). This means that UPMC and Presbyterian Shadyside, and their officers, agents, successors, and assigns, would each be liable to remedy the unfair labor practices from the outset and would be required to abide by all of the provisions in the Order, including both the cease-and-desist and affirmative order provisions. In contrast, under UPMC's guarantee, it will not be liable for remedying the unfair labor practices from the outset.

Thus, the majority's assertion that UPMC is liable to the same extent as its subsidiary, Presbyterian Shadyside, is simply incorrect. UPMC's guarantee is a form of contingent liability, which will *only* take effect if Presbyterian Shadyside defaults on its remedial obligations. Under joint and several liability, each entity is individually responsible for the entire obligation at the outset, whereas the guarantee obligates UPMC to remedy the unfair labor practices only if Presbyterian Shadyside fails to do so. Furthermore, contingent liability is not equivalent to joint and several liability because the imposition of liability on UPMC as the guarantor can only be invoked after a determination has been made that Presbyterian Shadyside has defaulted on its remedial obligations. See *Carpet, Linoleum & Soft-Tile Layers Local 1238 (Nielsen Bros., Inc.)*, 160 NLRB 475, 483 (1966) (An "aggrieved party . . . may not maintain an action against [a] guarantor . . . until legal remedies against the primary obligor have been exhausted."). Thus, obtaining the remedies to which aggrieved employees are entitled will be delayed until after a default determination is made—a determination that would likely involve further litigation.[2]

The majority's claim that UPMC is liable to the same extent as Presbyterian Shadyside is wrong for an additional reason. Under the guarantee, UPMC will not be liable for any prospective application of the cease-and-desist provisions of the Order and will not be subject to contempt sanctions for its *own* violations of the Order. By contrast, were UPMC and Presbyterian Shadyside found to be a single employer, each would be required to refrain from future unfair labor practices pursuant to the cease-and-desist provisions of the Order and each would be subject to contempt sanctions for any failure to do so.

The inadequacy of the judge's recommended Order is exacerbated by my colleagues' elimination of the customary Board remedy extending its Orders to respondents' officers, agents, successors, and assigns.[3] Under

[2] UPMC would undoubtedly continue its aggressive litigation strategy. It previously moved—unsuccessfully—to have the Board dismiss the single-employer allegation. Failing that, it refused to comply with subpoenas to produce information relevant to the single-employer allegation and has appealed a district court order enforcing the subpoenas to the Third Circuit Court of Appeals.

[3] The majority has twisted itself into a pretzel in an effort to mask the deficiencies in its decision. On the one hand, the majority grants UPMC's exception to the judge's inclusion of "officers, agents, successors, and assigns" language in the recommended Order (presumably because *UPMC made no such offer*). On the other hand, the majority

the majority's decision, if Presbyterian Shadyside fails to fulfill its remedial obligations, the General Counsel will seek to enforce UPMC's guarantee to obtain the ordered remedies. However, because the guarantee does not include "officers, agents, successors, and assigns" language, the General Counsel may not be able to enforce it if, for example, UPMC has ceased to operate or is sold to another entity. The omission of this language is especially problematic in the healthcare industry where corporate changes, including mergers and acquisitions, are common. Thus, the absence of "officers, agents, successors, and assigns" language in the guarantee raises serious enforcement problems that the Board avoids by routinely including this standard provision in its Orders.[4]

Indeed, I question whether the judge would have accepted UPMC's guarantee and found it as effective a remedy as would result from a litigated single-employer finding had the judge realized that UPMC would not agree to bind its officers, agents, successors, and assigns. I do not fault the judge for including this language—the exact contours of the guarantee were not spelled out in UPMC's Partial Motion to Dismiss and, as explained, "officers, agents, successors, and assigns" language is included in all Board Orders. However, the mismatch between the judge's recommended Order and UPMC's intended guarantee demonstrates that there was no meeting of the minds between the judge and UPMC. Moreover, my colleagues overreach by approving a guarantor proposal that was not even contemplated by the judge.

Underlying my colleagues' misguided acceptance of UPMC's inadequate guarantee is their failure to appreciate the significance of the single-employer allegation. A key objective of the Board's single-employer doctrine "is to ensure that the Board's decision and order are binding on the entity or entities responsible for controlling labor relations." See *Oaktree Capital Management, L.P. v. NLRB*, 452 Fed.Appx. 433, 438 (5th Cir. 2011). Here, the General Counsel has alleged that "there is reasonable cause to believe that *both* [UPMC and Presbyterian Shadyside] were intimately connected and had substantive co-accountability for labor relations." According to the General Counsel and the Charging Party, the evidence will show that UPMC has "comprehensive and ultimate authority over Presbyterian Shadyside" and that UPMC delegated authority over labor relations to Presbyterian Shadyside, but that delegation could be rescinded at any time. By accepting this guarantee, the General Counsel is denied the opportunity to litigate this important issue.

The majority's acceptance of the guarantee based on the judge's finding that no evidence was presented that UPMC independently committed unfair labor practices further reflects their failure to comprehend the remedial importance of a single-employer finding. "A 'single employer' relationship exists where two nominally separate entities are actually part of an integrated enterprise so that, for all purposes, there is in fact only a 'single employer.'" *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3d Cir. 1982). When two respondents are found to be a single employer, they are each jointly and severally liable for any unfair labor practices committed by the other. See *Lederach Electric, Inc.*, 362 NLRB No. 14, slip op. at 1 (2015), enfd. *Morris Road Partners, LLC v. NLRB*, 637 Fed.Appx. 682 (3d Cir. 2016); *NLRB v. Bolivar-Tees, Inc.*, 551 F.3d 722, 722 fn. 2 (8th Cir. 2008) ("The single employer doctrine is a Board creation that treats two or more related enterprises as a single employer for purposes of holding the enterprises jointly . . . liab[le] for any unfair labor practices.") (citation omitted). Thus, contrary to the majority, it is entirely irrelevant that UPMC is not charged with directly committing any unfair labor practices. The majority is also wrong when they refer to UPMC as a mere "back-up party" and state that Presbyterian Shadyside "*should* be primarily responsible." Indeed, as they recognize elsewhere in their decision, "when a parent company is found to be a single employer with its subsidiary, the parent company is liable for the subsidiary's unfair labor

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disingenuously claims that the "Order is binding against [UPMC's] officers, agents, successors, and assigns to the extent those parties would be bound under the Federal Rules of Civil Procedure, regardless of whether the Order specifically includes such language" (in likely recognition that the absence of this requirement renders its Order wholly inadequate). The majority cannot have it both ways; indeed it fails as to each.

As an initial matter, I agree with Member McFerran that the majority has failed to demonstrate that Board Orders automatically run against "officers, agents, successors, and assigns" of adjudged respondents. This is not surprising as the Board, since its inception, has expressly included this important remedial language in its Orders—it has not left it to mere implication. See, e.g., *Oregon Worsted Co.*, 3 NLRB 36 (1937). Further, when evaluating a proposed settlement, the Board considers the actual terms offered by the respondent. The Board will not imply additional, not-agreed-upon terms. See, e.g., *Enclosure Suppliers, LLC*, 09–CA–046169, 2011 WL 2837659 (July 14, 2011) (rejecting a consent order because it expressly limited compliance to the notice-posting period even though the respondent argued that it implicitly provided for a standard compliance period).

At bottom, by granting UPMC's exception and deleting "officers, agents, successors, and assigns" from the Order, while simultaneously asserting that this obligation nonetheless remains, the majority attempts to fit the square peg of UPMC's guarantor offer into the round hole of consent orders. The pieces do not fit. And, as I explain below, consent orders simply are not at issue in this case.

[4] The majority mischaracterizes the General Counsel's position regarding the removal of this language. The General Counsel's statement that doing so "would change nothing from a legal standpoint" expresses only that UPMC's guarantee would have been deficient even had "officers, agents, successors, and assigns" been included.

practices *'to the same extent'* as the subsidiary," citing *Flat Dog Productions, Inc.*, 347 NLRB 1180, 1182 (2006) (emphasis added).[5]

2. The majority has overreached by addressing an issue not presented in this case and has failed to provide an adequate justification for overruling *Postal Service*.

Rather than resolving this case based on the issue before us, my colleagues have reached out to decide an issue that is clearly not presented: whether to overrule *Postal Service*, 364 NLRB No. 116. In *Postal Service*, the Board clarified the appropriate standard for evaluating consent orders and required that such orders which incorporate settlement terms proposed by a respondent, over the objections of the General Counsel and the charging party, provide a full remedy for all of the violations alleged in the complaint. Id., slip op. at 1.[6] *Postal Service* is inapplicable here because this case does not involve a consent order.[7] None of the parties has asked the Board to overrule *Postal Service* or even argued that *Independent Stave Co.*, 287 NLRB 740 (1987), is relevant to determining whether the judge erred in dismissing the single-employer allegation.[8]

I question my colleagues' motives and the wisdom of overruling recent precedent involving consent orders in a case where it is not implicated, solely to adopt Chairman Miscimarra's dissent in *Postal Service*. Further, their attempt to substitute *Postal Service* with *Independent Stave* fails both analytically and factually. *Independent Stave* involved non-Board settlement agreements between the respondent and three charging parties, opposed by the General Counsel. 287 NLRB at 740. Based on non-Board settlement agreements between the respondent and those charging parties, the Board granted the respondent's motion to dismiss complaint allegations relating to their claims. However, the *Independent Stave* Board rejected the respondent's motion to dismiss as to a fourth charging party who did not sign a settlement agreement. Id. at 744. Because there had been no agreement, complaint allegations as to that charging party were remanded for a hearing.

As the majority explained in *Postal Service*, none of the policies underlying the Board's *Independent Stave* decision applies in consent order cases. In *Independent Stave*, the Board repeatedly cited its "policy of encouraging the peaceful, nonlitigious resolution of disputes," "commitment to private negotiated settlement agreements," "policy of 'encouraging parties to resolve disputes without resort to Board processes,'" and "strong commitment to settlements." Id. at 741 (citations omitted). These considerations are obviously not present when only the respondent has agreed to be bound by the terms of the consent order.

Additionally, the *Independent Stave* Board's justification for accepting a less than full remedy does not apply in consent order cases. In *Independent Stave*, the Board explained that a less than full remedy was acceptable because the "parties to a non-Board settlement recognize[] that the outcome of litigation is uncertain" and "decide to accept a compromise" rather than face the risks of litigation. Id. at 743.[9] By contrast, in consent

[5] In *Flat Dog Productions*, as in all cases involving single-employer findings, the Board imposed joint and several liability on the parent and subsidiary companies, and their officers, agents, successors, and assigns, for the violations committed by the subsidiary company. See id.

[6] My colleagues refer to consent orders as "consent settlement agreements." As the Board explained in *Postal Service*, such a description is inaccurate because there is no "agreement" between any of the parties. Id., slip op. at 22 fn. 5.

[7] The majority incorrectly claims that the General Counsel agrees that the standard for consent orders is at issue here. In his exceptions brief, the General Counsel merely commented that "to the extent the judge's decision . . . *could be* considered equivalent to approving a *de facto* consent order, the *Independent Stave* standard is not met." (emphasis added.) The majority also asserts that, after the issuance of *Postal Service*, the Charging Party filed a letter with the Board requesting that it take notice of the decision. What is most relevant here is the position of UPMC and tellingly, the majority conveniently omits that UPMC repeatedly asserted to the Board that "the concept of consent orders is irrelevant to this matter" and that the judge "did not enter a consent order and did not accept a proposed settlement by UPMC." And in response to the Charging Party's letter to the Board (which the majority *again* fails to acknowledge), the Respondents vehemently argued that *Postal Service* had no bearing on this case. The Respondents stated:

> The authority submitted by the [Charging Party] concerns the standard to be used by administrative law judges in approving "consent orders," a concept that is neither pertinent nor significant to the pending exceptions. A consent order involves the dismissal of a complaint by an administrative law judge based on settlement terms proposed by a respondent over the objections of the General Counsel and charging party. [The administrative law judge] did not enter a consent order and did not accept a proposed settlement by UPMC. He did not rely on, analogize to, or in any way address consent order principles. Instead, he granted UPMC's partial motion to dismiss based on his express finding that further litigation would not effectuate the policies of the Act.

[8] Under *Independent Stave*, the Board considers all the circumstances surrounding a settlement agreement, including: "(1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes." 287 NLRB at 743.

[9] In *Independent Stave*, the Board criticized *Clear Haven Nursing Home*, 236 NLRB 853 (1978), where the Board had rejected a non-Board settlement agreement between the respondent and charging party

order cases, the charging party and the General Counsel have decided to accept the risks of litigation in the hopes of receiving a full remedy. Thus, nothing in *Independent Stave* suggests that the standard should apply to consent orders. Rather, the case was explicitly formulated to evaluate non-Board settlement agreements and was driven by the Board's policy favoring private dispute resolution and by deference to the charging party's judgment concerning its own interests in accepting less than a full remedy.

I strongly disagree with my colleagues' assertion that applying the *Independent Stave* standard in consent order cases "encourag[es] voluntary dispute resolution, promot[es] industrial peace, conserv[es] the resources of the Board, and serv[es] the public interest." It is absurd for the majority to claim that these purposes of the Act are achieved in consent order cases where the charging party objects to the respondent's proposed settlement terms. As the Board held in *Independent Stave*, "*honoring the parties' agreements* advances the Act's purposes of encouraging voluntary dispute resolution, promoting industrial peace, conserving the resources of the Board, and serving the public interest." Id. (emphasis added).[10] When the Board approves a consent order, it is obviously not honoring the parties' agreement because only the respondent has agreed to be bound. Further, consent orders do not advance the *Independent Stave* goals of encouraging voluntary dispute resolution or promoting industrial peace because the charging party objects. In *Independent Stave*, the Board explained that the public interest is served by "encouraging the parties' achievement of *mutually agreeable* settlement without litigation." Id. at 742 (emphasis added). Clearly, a consent order is not a mutually agreeable outcome. Therefore, overruling *Postal Service* does not advance the purposes and policies of the Act.

None of the other reasons cited by my colleagues in support of applying the *Independent Stave* standard is persuasive. The majority asserts that applying *Independent Stave* to consent orders is consistent with the Board's longstanding policy of accepting reasonable settlement agreements. As discussed, the majority errs in equating consent orders with settlement agreements because there is no "agreement" between the parties in consent order cases. Further, they oversimplify the *Independent Stave* standard by referring to it as a test of reasonableness. As the Board explained in *Independent Stave*, the test is "whether it will effectuate the purposes of the Act to give effect to the [parties'] settlement" based on the consideration of a number of factors. Id. at 741. Indeed, the cases cited by the majority emphasize that the opposition of the General Counsel and the charging party is "[o]ne of the foremost considerations" and "is definitely significant and militates heavily against accepting" a proposed settlement offer. *Iron Workers Local 27 (Morrison-Knudson)*, 313 NLRB 215, 217 (1993); see also *Sea Jet Trucking Corp.*, 327 NLRB 540, 550 (1999). My colleagues also contend that the Board's acceptance of a less than full remedy may be in the best interest of the parties and will often leave them in a better position than litigation. That is a question for all the parties to decide and it is impossible to know whether settlement or litigation will provide the best outcome for the parties. There is no reason for the Board to substitute its judgment for that of the parties in weighing the risks and benefits of litigation versus settlement. Moreover, as this is not a "settlement," it cannot be assessed under those standards.

In sum, not only have my colleagues failed to provide an adequate justification for their decision to overrule the *Postal Service* standard just one year after the Board adopted it, they have overreached to address this issue even though it is not presented in this case.

3. UPMC's guarantee does not satisfy *Postal Service* or *Independent Stave*.

Although neither *Postal Service* nor *Independent Stave* applies here because this case does not involve a consent order or settlement agreement, UPMC's guarantee is clearly insufficient under either standard. UPMC's guarantee fails the *Postal Service* standard because it does not provide a full remedy for all of the violations alleged in the complaint. 364 NLRB No. 116, slip op. at 1, 3. UPMC's guarantee also fails to satisfy the *Independent Stave* standard. 287 NLRB at 743. First, both the General Counsel and the Charging Party strenuously object to the guarantee. Second, it is not reasonable to accept the guarantee at this stage of the proceeding because, as explained, the guarantee does not provide an adequate remedy for the alleged violations.[11] Third, UPMC and its subsidiaries have been involved in ongoing litigation at

union even though it provided the union with a better remedy than it would have received had the General Counsel successfully litigated the case. 287 NLRB at 742. Contrary to my colleagues, the Board's discussion of *Clear Haven* does not support overruling *Postal Service* because *Clear Haven* involved a non-Board settlement and a more than full remedy.

[10] My colleagues conveniently omit the italicized portion of this quote.

[11] My colleagues believe that accepting the guarantee is reasonable in light of the risks inherent in litigation and in order to expedite the resolution of this proceeding. However, by strenuously objecting to the guarantee, the General Counsel and the Charging Party have agreed to assume the risk of further litigation. The Board should not, under the guise of efficiency and conservation of resources, force an inadequate guarantee upon the General Counsel and Charging Party, where they have chosen with open eyes to reject it.

the Board and UPMC's subsidiaries have been found to have violated the Act.[12] In addition, the violations alleged in this case may, if found, arguably constitute a breach of the previous settlement agreements, triggering the default provisions of those agreements. Thus, I would find that UPMC's guarantee fails to satisfy either the *Postal Service* or *Independent Stave* standards.

Ultimately, my colleagues have side-stepped the actual issue presented in this case in their zeal to reverse *Postal Service*, 364 NLRB No. 116 (2016), and embrace then-Member Miscimarra's dissent. On behalf of the Agency, I am disheartened by their actions; on the basis of the law, I dissent.

Dated, Washington, D.C. December 11, 2017

Mark Gaston Pearce, Member

NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

This case presents the Board's new majority with a pretext to overrule recent precedent[1]—without notice or an opportunity for briefing. But the majority does more than restore an earlier, flawed rule with respect to respondents' unilateral efforts to terminate Board litigation over the objections of the General Counsel and the charging party. It reaches a result that threatens to broadly frustrate the General Counsel's ability to establish a respondent's status as a "single employer" under the National Labor Relations Act and thus its liability for unfair labor practices committed by a nominally independent entity. Here, what the majority calls a "consent settlement agreement" (a misleading misnomer[2]) amounts to a potentially illusory promise by the respondent employer that does not terminate the litigation, but instead threatens to prolong it, and that does not represent even a rough equivalent of a single-employer finding. In no compelling way does the unprecedented outcome here effectuate the purposes of the National Labor Relations Act.

The majority's new approach, meanwhile, seemingly invites gamesmanship from respondents facing liability under the Act. They are effectively encouraged to find ways around the General Counsel and to deal directly with the Board, straining its statutory role of neutral adjudicator. I agree with Member Pearce's well-reasoned dissent here, but write separately to emphasize certain points.

I.

In this case, as I will explain, it became very difficult for the General Counsel to prosecute, and the administrative law judge to adjudicate, the single-employer allegation against UPMC in a timely way. The judge accepted UPMC's proffered way out of the dilemma—perhaps understandably, but nevertheless erroneously.

This case involves allegations that UPMC and its hospital subsidiary, Presbyterian Shadyside, are single employers who committed a wide range of unfair labor practices—from surveillance to discriminatory discharges—in resisting a union-organizing drive. After unsuccessfully moving to dismiss the single-employer allegation (the Board denied the motion), UPMC contested document subpoenas relating to the single-employer allegation and has now pursued that dispute to the U.S. Court of Appeals for the Third Circuit. The administrative law judge accordingly severed the single-employer allegation from the rest of the case, while proceeding to conduct a hearing on the remaining issues. As he explained, the judge's "reason for bifurcating the case was that [he] did not want ongoing subpoena enforcement proceedings regarding the single employer issue to delay [his] resolution of the substantive unfair labor practice issues."

The judge then found that Presbyterian Shadyside had committed a variety of unfair labor practices. (His decision is pending before the Board on exceptions from all parties.) In turn, UPMC asked the judge to dismiss the single-employer allegation, offering in its motion to "guarantee the performance by Presbyterian Shadyside of any remedial aspects of the [judge's] Decision and Order

[12] Some of these cases have resulted in settlement agreements requiring remedial action by UPMC's subsidiaries, including Presbyterian Shadyside. See, e.g., Cases 06–CA–081896 et al. (*UPMC I*); Cases 06–CA–119480 et al. (*UPMC III*). At least one case has resulted in a finding of a violation against Presbyterian Shadyside and another one of UPMC's subsidiaries. See *UPMC*, 362 NLRB No. 191, slip op. at 1 fn. 2 (2015), which also imposed remedial obligations on UPMC (pursuant to a stipulation) even though it was not found to violate the Act "as a separate entity." Other cases are pending. See, e.g., Cases 06–CA–171117 et al. (*UPMC IV*). In that case, as here, a single-employer allegation against UPMC has been severed for litigation after the conclusion of the merits litigation.

[1] *Postal Service*, 364 NLRB No. 116 (2016). As explained in Section II-A below, the majority cites no compelling reason for reversing precedent here, even if the issue decided in *Postal Service* were fairly presented on the facts of this case.

[2] In cases like this one, as the *Postal Service* Board pointed out, "there is no 'agreement' between any parties," and the Board's order is "involuntarily imposed on all parties other than the respondent." 364 NLRB No. 116, slip op. at 2–3 fn. 5. The majority today adopts the unfortunate terminology of then-Member Miscimarra's dissent in *Postal Service*.

[finding Presbyterian Shadyside liable] *which survive the exceptions and appeals process*" (emphasis added).

Over the objections of the General Counsel and charging party Union—and without holding a hearing on the single-employer allegation—the judge granted UPMC's motion. He found that UPMC's "offer to serve as a guarantor of any remedy that the Board may ultimately order . . . [was] as effective a remedy" as could result from a single-employer finding and the imposition of joint and several liability on UPMC and Shadyside. The judge cited the "time-consuming and expensive course of litigating the single employer issue to its conclusion" and the "risk that further litigation . . . [might] result in a finding that UPMC and Presbyterian Shadyside [were] not, in fact a single employer." Further litigation, the judge concluded, thus "would not effectuate the purposes of the Act."

Accordingly, the judge issued a recommended order reciting (1) that "UPMC, its officers, agents, successors, and assigns shall be the guarantor of any remedies that the Board may order in the original decision in this case" and (2) that

> [a]s the guarantor, Respondent UPMC must ensure that … Presbyterian Shadyside takes all steps necessary to comply with any remedies that may be contained in the Board's Order, including providing for any such remedies itself, *if … Presbyterian Shadyside is unable to do so.* [emphasis added]

All parties have excepted to the judge's recommended order. The General Counsel and the Charging Party challenge the judge's finding that accepting UPMC's guarantee was the equivalent of a single-employer determination. UPMC excepts to the judge's inclusion of order language binding its "officers, agents, successor, and assigns," arguing that it had never offered such a commitment.

II.

The procedural posture of this case is unusual, perhaps unique, and as a result, the case does not fit neatly (if at all) into preexisting categories for evaluating situations in which the Board has been asked to end a proceeding over the objection of one or more of the parties involved. Until today, the Board had two basic frameworks. In the case of a true settlement to which the General Counsel *or* the charging party (in addition to the respondent) had agreed, the Board applied the framework of *Independent Stave Co.*, 287 NLRB 740 (1987). *Independent Stave* was based on the Board's longstanding "policy of encouraging the peaceful, nonlitigious resolution of disputes" through "private negotiated settlement agreements" and on the Board's corresponding deference to the parties' own determinations that compromise (i.e., accepting less than a full Board remedy) was in their best interests. Id. at 741–743.

In contrast, where *neither* the General Counsel *nor* the charging party had entered into a settlement with the respondent, but the respondent offered to consent to a Board remedial order (over the objections of both the General Counsel and the charging party), the Board applied the framework of *Postal Service*, supra. In *Postal Service*, the Board rejected the application of the *Independent Stave* standard to such situations, observing that "[n]either of the considerations that justify approving non-Board settlements that lack the full remedy called for under Board law are present in the case of a consent order agreed to by no party other than the respondent," 364 NLRB No. 116, slip op. at 2, but found that acceptance of such an order would serve the goals of the statute if, and only if, the respondent offered to consent to an order providing a full remedy for the alleged violations, as such an order would serve interests of administrative economy in preventing further unnecessary litigation. Id at 3.

A.

Initially, the majority today reaches out to overrule *Postal Service* and holds that *Independent Stave* applies uniformly, despite the fact that the circumstances here do not align with either of these frameworks. I believe that *Postal Service*, in which I participated, was correctly decided and that the majority errs in overruling that decision without even bothering to give notice or to invite briefing, a sharp break with well-established practice,[3]

[3] In the last decade, issuing a notice and invitation to file briefs has become the Board's routine practice in significant cases, particularly those where the Board is contemplating reversal of precedent. See, e.g., *Temple University Hospital, Inc.*, Case 04–RC–162716, Order Granting Review in Part and Invitation to File Briefs (filed Dec. 29, 2016), available at https://apps.nlrb.gov/link/document.aspx/09031d45822fb922 (whether the Board should exercise its discretion to decline jurisdiction over the employer); *King Soopers, Inc.*, 364 NLRB No. 93 (2016) (whether the Board should revise its treatment of search-for-work and interim employment expenses as part of the make-whole remedy for unlawfully discharged employees), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017); *Columbia University*, 364 NLRB No. 90 (2016) (whether the Board should modify or overrule its decision in *Brown University*, 342 NLRB 483 (2004), in which it held that graduate assistants who perform services at a university in connection with their studies are not statutory employees under the National Labor Relations Act); *Miller & Anderson, Inc.*, 364 NLRB No. 39 (2016) (whether the Board should adhere to its decision in *Oakwood Care Center,* 343 NLRB 659 (2004), which disallowed inclusion of solely employed employees and jointly employed employees in the same unit absent consent of the employers, and if not, whether the Board should return to the holding of *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000), which permits the inclusion of both solely and jointly employed employees in the same unit without the consent of the employers); *Service Workers Local 1192 (Buckeye Florida Corp.)*, 362 NLRB No. 187 (2015) (whether the Board should

and the process followed in *Postal Service* itself.[4] (None of the cases cited by the majority diminish the fact that inviting briefs has become an established Board norm – and the majority tellingly cites no recent case in which

reconsider its rule that, in the absence of a valid union-security clause, a union may not charge nonmembers a fee for processing grievances); *BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015) (whether the Board should adhere to its existing joint employer standard or adopt a new standard); *Northwestern University*, 362 NLRB No. 167 (2015) (whether the Board should find grant-in-aid scholarship football players are employees under the NLRA); *Purple Communications, Inc.*, 361 NLRB 1050 (2014) (whether the Board should adopt a rule that employees who are permitted to use their employer's email for work purposes have the right to use it for Section 7 activity, subject only to the need to maintain production and discipline); *Pacific Lutheran University*, 361 NLRB 1404 (2014) (whether a religiously-affiliated university is subject to the Board's jurisdiction, and whether certain university faculty members seeking to be represented by a union are employees covered by the National Labor Relations Act or excluded managerial employees); *Latino Express, Inc.*, 361 NLRB 1171 (2014) (whether, in awarding backpay, the Board should routinely require the respondent to: 1) submit documentation to the Social Security Administration so that backpay is allocated to the appropriate calendar quarters, and 2) pay for any excess federal and state income taxes owed as a result of receiving a lump-sum payment); *Babcock & Wilcox Construction Co.*, 361 NLRB 1127 (2014) (whether the Board should change the standard for determining when the Board should defer to an arbitration award), rev. denied sub nom. *Beneli v. NLRB*, 873 F.3d 1094 (9th Cir. 2017); *New York University*, Case 02–RC–023481, Notice and Invitation to File Briefs (filed June 22, 2012), available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3252/ntc_02-rc-23481_nyu_and_polytechnic_notice___invitation.pdf (whether graduate student assistants who perform services at a university in connection with their studies are or are not statutory employees within the meaning of Section 2(3) of the National Labor Relations Act); *Point Park University,* Case 06–RC–012276, Notice and Invitation to File Briefs (filed May 22, 2012), available at https://apps.nlrb.gov/link/document.aspx/09031d4580a0ee7d (whether university faculty members seeking to be represented by a union are employees covered by the National Labor Relations Act or excluded managers); *D.R. Horton, Inc.*, 357 NLRB 2277 (2012) (whether mandatory arbitration agreements that preclude employees from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial, violate the NLRA), enf. granted in part and denied in part, 737 F.3d 344 (5th Cir. 2013); *Hawaii Tribune-Herald*, Case 37–CA–007043, Notice and Invitation to File Briefs (filed March 2, 2011), available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3253/stephensmediainvite.pdf (whether the Respondent had a duty to provide the Union with a statement provided to it by an employee or any other statements that it obtained in the course of its investigation of another employee's alleged misconduct); *Chicago Mathematics and Science Academy Charter School, Inc.*, Case 13–RM–001768, Notice and Invitation to File Briefs (filed January 10, 2011), available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3253/chicago_mathematics_brief.pdf (whether an Illinois charter school should fall under the jurisdiction of the NLRB or the Illinois Educational Labor Relations Board); *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011) (what constitutes an appropriate bargaining unit), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013); *Roundy's Inc.*, Case 30–CA–017185, Notice and Invitation to File Briefs (filed November 12, 2010), available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3253/roundys_notice_and_invitation.pdf (what standard the Board should apply to define discrimination in cases alleging unlawful employer discrimination in nonemployee access); *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011) (what duties a successor employer has toward an incumbent union); *Lamons Gasket Co.*, 357 NLRB 739 (2011) (whether, and how long, employees and other unions should have to file for an election following an employer's voluntary recognition of a union); *J. Picini Flooring*, 356 NLRB 11 (2010) (whether Board ordered remedial notices should be posted electronically and, if so, what legal standard should apply and at what stage of the proceedings any necessary factual showing should be required); *Kentucky River Medical Center*, 356 NLRB 6 (2010) (whether the Board should routinely order compound interest on backpay and other monetary awards in backpay cases and if so, what the standard period for compounding should be); *Long Island Head Start Child Development Services*, 354 NLRB No. 82 (2009) (two-member Board decision) (whether the Board should find contract termination based on bargaining even in the absence of any contractually-required notice); *Register Guard*, 351 NLRB 1110 (2007) (whether employees have a Section 7 right to use their employer's email system to communicate with one another, what standard should govern that determination, and whether an employer violates the Act if it permits other nonwork-related emails but prohibits emails on Section 7 matters), enfd. in part and remanded in part sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009); *Can-Am Plumbing, Inc.*, 350 NLRB 947 (2007) (whether the job targeting program at issue violated the Davis-Bacon Act), enfd. 340 Fed.Appx. 354 (9th Cir. 2009); *Dana Corp.*, 351 NLRB 434 (2007) (whether the Board should modify its recognition bar doctrine as articulated in *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966), *Smith's Food & Drug Centers*, 320 NLRB 844 (1996), and *Seattle Mariners*, 335 NLRB 563 (2001)); *Alyeska Pipeline Service Co.*, 348 NLRB 779 (2006) (whether a systemwide presumption is warranted in the circumstances of the instant case); *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006) (seeking comment relating to (1) the meaning of "assign," "responsibly to direct," and "independent judgment," as those terms are used in Section 2(11) of the Act; and (2) an appropriate test for determining unit placement of employees who take turns or "rotate" as supervisors), see also *Croft Metals, Inc.*, 348 NLRB 717 (2006) and *Golden Crest Heath Center*, 348 NLRB 727 (2006); *Firstline Transportation Security*, 347 NLRB 447 (2006) (whether the Board should assert jurisdiction over the employer, a private company contracting with the Transportation Security Administration).

[4] 364 NLRB No. 116, slip op. at 1 fn. 1 (referring to notice and invitation to file briefs). The majority insists the "decision to allow such briefing is purely discretionary and is based on the circumstances of each case," but its disregard for the recognized benefits of public participation in the Board's decision-making process is regrettable—and one can only hope that today's approach does not signal a new Board policy of excluding the public from important decisionmaking.

Remarkably, the majority points to the fact that the *Postal Service* Board invited briefing as a reason *not* to do so here, asserting that "there is no reason to believe" that different arguments might be presented to the Board. But our assumption should be that public participation is desirable, unless there are legitimate and compelling reasons to think otherwise. No party to this case, and no member of the public, has been permitted to address the Board's decision in *Postal Service* and its specific rationale, as opposed to the general question presented. Nor has there been an opportunity for the public to address the impact of the application of the *Postal Service* analysis to the decision of specific cases and controversies. The better course here would be to give interested persons (including those who did not file briefs in *Postal Service*) the opportunity to address the Board.

the Board refused to seek briefing over objections from a member.[5])

The majority presents no compelling justification for this reversal. A change in the Board's composition is not a basis for revisiting an earlier decision. See *UFCW, Local No. 1996 (Visiting Nurse Health System, Inc.)*, 338 NLRB 1074, 1074 (2003) (full Board), citing *Iron Workers Local 471 (Wagner Iron Works)*, 108 NLRB 1237, 1239 (1954).[6] In addition, the majority does not even attempt to argue that the rule adopted in *Postal Service* is somehow contrary to the National Labor Relations Act. In fact, Section 10(a) of the Act makes explicit that the Board's authority to redress unfair labor practices by adjudicating cases "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." 29 U.S.C. §160(a).

While the majority says that the *Postal Service* Board "improperly deviated from policies favoring the appropriate settlement of disputed allegations," it never persuasively explains how the prior Board erred in distinguishing between (1) a respondent's unilateral offer to resolve a case, over the objections of both the General Counsel and the charging party; and (2) a bilateral settlement that actually reflects the agreement of the respondent and at least one opposing party. To treat cases in which there has been no settlement between opposing parties as if there *had* been such a settlement—by making *Independent Stave* a unitary standard applicable to consent-order cases, as well as settlement cases—is irrational.[7]

[5] The majority asserts that there are "numerous" cases where the Board "has freely overruled or disregarded established precedent…without supplemental briefing." But the six decisions the majority cites are easily distinguishable from this one. See *E.I. Du Pont de Nemours*, 364 NLRB No. 113 (2016) (considering whether unilateral changes made after expiration of a collective-bargaining agreement violate the Act); *Graymont PA, Inc.*, 364 NLRB No. 37 (2016) (considering, inter alia, whether the Board is precluded from considering an unalleged failure to timely disclose that requested information does not exist when the unalleged issue is closely connected to the subject matter of the complaint and has been fully litigated); *Loomis Armored U.S., Inc.*, 364 NLRB No. 23 (2016) (considering whether an employer, having voluntarily recognized a "mixed-guard union" as the representative of its security guards, lawfully may withdraw recognition if no collective-bargaining agreement is in place, even without an actual loss of majority support for the union); *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015) (considering whether an employer's obligation to check off union dues from employees' wages terminates upon expiration of a collective-bargaining agreement); *Pressroom Cleaners*, 361 NLRB 643 (2014) (considering, inter alia, whether an employer can limit its backpay liability in compliance through an evidentiary showing or whether the predecessor employer's terms and conditions of employment should continue until the parties bargain to agreement or impasse); *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014) (considering, inter alia, whether an employee was engaged in "concerted activity" for the purpose of "mutual aid or protection" when she sought assistance from her coworkers in raising a sexual harassment complaint to her employer).

First, in all six cited cases a party explicitly and publicly asked the Board to overrule precedent, a fact surely not lost on persons interested in the development of federal labor law. (The General Counsel asked the Board to revisit or overrule precedent in *Fresh & Easy*, *Lincoln Lutheran*, *Loomis*, *Graymont*, and *Du Pont*; in *Pressroom Cleaners*, the Charging Party asked the Board to overrule precedent.)

In two cited cases, *Loomis* and *Lincoln Lutheran*, amicus briefs were actually filed. See *Loomis Armored U.S., Inc.*, 364 NLRB No. 23 (2016) (amicus brief filed by SEIU urging the Board to overrule *Wells Fargo Corp.*, 270 NLRB 787 (1984)); *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015) (amicus brief filed by National Right to Work Legal Defense Foundation urging the Board not to overrule *Bethlehem Steel*, 136 NLRB 1500 (1962)).

Both *Du Pont* and *Lincoln Lutheran*, meanwhile, were the culmination of long-running discussions of the precedent they ultimately overruled. In *Du Pont*, the Board accepted a remand from the United States Court of Appeals for the District of Columbia Circuit for the express purpose of deciding between two conflicting branches of precedent. See *E.I. Du Pont de Nemours and Co. v. NLRB*, 682 F.3d 65, 70 (D.C. Cir. 2012). *Lincoln Lutheran*, in turn, was the culmination of a 15-year dialogue with the United States Court of Appeals for the Ninth Circuit about *Bethlehem Steel.* See *WKYC-TV, Inc.*, 359 NLRB 286, 286 (2012) (discussing history). And, as already pointed out, in none of the cases cited by the majority did the Board refuse to request briefing over the objection of one or more Board members.

The cases cited by the majority throw into even sharper relief the aberrance of the majority's process in this case. Unlike the six cases cited by the majority, here, no party—not the General Counsel, the Charging Party, or the Respondent—has asked us to revisit or overrule precedent. This decision is not the culmination of a long-running dialogue with a federal court of appeals. Neither the parties nor the public knew that the Board was planning to overrule precedent in this case.

[6] The majority points out that these cases involved parties' motions to reconsider earlier decisions, filed under Sec. 102.48 of the Board's Rules and Regulations. But the underlying principle applies where, as here, overruling recent precedent is the issue. Even when Board members change, Board law should stay the same, unless there is a good reason—independent of the Board's new composition—to change it. The majority quotes with apparent approval the observation of the U.S. Court of Appeals for the District of Columbia Circuit that Board doctrine will "invariably fluctuate with the changing compositions of the Board." *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1097 (D.C. Cir. 2001). It seems unlikely, however, that a reviewing court would approve the Board's reversal of precedent if the only credible reason offered for the change was that the Board had different members. Nor does the fact that a Board member's statutory term expires every year (also cited by the majority) mean that the Board can or should treat its precedent as perishable. Indeed, in *Wagner Iron Works*, supra, the Board observed that the "terms of [the Board's] members were arranged by Congress in a manner to prevent any abrupt dislocation in the discharge of its functions." 108 NLRB at 1239. Today's decision, of course, represents just such an "abrupt dislocation" of recent precedent.

[7] Reviewing courts will reject a legal rule adopted by the Board where it is irrational or where the Board's explication of the rule is "inadequate, irrational or arbitrary." *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 796, 721 (2001), quoting *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S., 359, 364 (1998). This strikes me as such a case.

The majority's argument essentially boils down to the fact that *Postal Service* should not be treated as precedent because it was "issued barely more than one year ago" and because the Board there overruled precedent. But as the *Postal Service* Board explained, its holding returned Board law to the standard adopted in *Electronic Workers IUE, Local 201 (General Electric Co.)*, 188 NLRB 855, 857 (1971).[8] The decisions overruled in *Postal Service*—which applied the *Independent Stave* standard to cases in which both the General Counsel and the charging party objected to the respondent's proffered settlement—reflect no consideration of the problem inherent in treating cases in which there has been no settlement as if such a settlement had been reached, invoking policies that are not genuinely implicated. In sum, *Postal Service* adopted a fully rationalized approach to an area where the Board's existing standard had never been persuasively explained (and could not be).

B.

But perhaps even more concerning than the majority's overreach in overruling *Postal Service* is the fact that acceptance of the Respondent's offer here is manifestly inappropriate *regardless* of which standard one chooses to apply. *None* of the policy goals that the Board has previously pursued by application of either *Independent Stave* or *Postal Service* are, or can conceivably be, achieved in this case.

Certainly, this outcome does not support the Board's preference for private resolution of disputes. There has been no *agreed-upon* resolution of the case whatsoever and so the policies favoring settlement underlying *Independent Stave* are not implicated at all. The General Counsel and the Charging Party have determined that their interests are best served by litigating the single-employer issue; the underlying dispute that led to the proceeding, meanwhile, remains very much alive.

The majority's outcome also does not support—and, indeed, is likely to undermine—the Board's interest in administrative economy and avoiding unnecessary litigation. UPMC's proffered "guarantee" finally resolves nothing. The "guarantee" applies if, but only if, a Board order imposing liability on Presbyterian Shadyside is enforced by a federal court of appeals. (As UPMC told the judge, the guarantee is subject to "the exceptions and appeals process.") In other words, the litigation continues—at the Board and on to the court of appeals—even after the Board adopts the judge's recommended order. Should the Board adopt the judge's findings against Presbyterian Shadyside, UPMC is entirely free to assist its subsidiary in challenging any Board remedial order running against the subsidiary and in challenging any subsequent order fixing liability in a separate compliance proceeding. The *Independent Stave* framework, of course, was designed for true settlements that finally resolve all issues in a Board proceeding and that terminate the case. The "guarantee" here is something quite different: it is entirely contingent on the ultimate outcome of the case against Presbyterian Shadyside. Even under the *Independent Stave* test, the fact that a resolution proffered by a respondent "will not necessarily save the parties from the time and expense of extensive litigation" is a powerful reason to reject it. *Copper State Rubber*, 301 NLRB 138, 138 (1991), overruled on other grounds in *Postal Service*, supra.

In addition, of course, the "guarantee" itself has spawned litigation—this case. Notably, today's order itself is subject to judicial review at the Charging Party's behest.[9] Should a court of appeals find that the Board erred in accepting UPMC's guarantee, the case would return to the Board and the single-employer issue would have to be litigated (absent a true settlement)—after a long and unwarranted delay. As his decision makes clear, the administrative law judge accepted UPMC's "guarantee" because—thanks in no small part to UPMC's tactics—litigation of the single-employer issue promised to be time-consuming. But accepting the "guarantee" only saved time for the judge in the proceeding he was conducting. It hardly brought a final resolution to the single-employer issue.

The majority insists that this fact makes no difference, because even the Board's determination that UPMC and Presbyterian Shadyside were a single employer would be subject to judicial review. But this claim misses the point. Here, the General Counsel (and the Charging Party) oppose accepting UPMC's "guarantee" and ask the Board instead to permit litigation and to adjudicate the single-employer issue. That process is the rule, not the exception—and so the burden should be on UPMC (and

[8] While the majority disputes whether the *General Electric* Board was purporting to establish a broadly applicable rule to say it would *only* approve consent settlement agreements that provide a full remedy, the Board in *General Electric* adopted the Trial Examiner's recommendation that the proposed consent order be adopted, and in so doing recited the Trial Examiner's findings. The Trial Examiner noted that he was approving the order on the grounds that the order "provide[s] a full remedy with respect to all aspects of the . . . violations alleged in the complaint . . . to which the General Counsel and Charging Party are entitled to under current Board law, *and that it also will protect the public interest and effectuate the purposes and policies of the Act*." 188 NLRB at 857 (emphasis added). Thus, the Trial Examiner's order suggests, contrary to the majority's suggestion, that a full remedy—as the Board recognized in *Postal Service*—is the minimum required to approve unilateral settlement proposals.

[9] See, e.g., *Bloom v. NLRB*, 30 F.3d 1001 (8th Cir. 1994).

the majority) to demonstrate why accepting the "guarantee" is necessary. The fundamental premise of *Independent Stave*, of course, is that the consensual termination of a proceeding before the Board is generally desirable if it produces finality. Here there is neither consent, nor finality. Indeed, the majority's criticism of my view on this issue implicitly concedes the point that its own approach is no more expedient than the resolution of this case through normal Board processes. By asserting that both approaches could involve subsequent litigation, it undermines its argument that its approach can be justified by administrative economy.

And if this were not enough to give the Board pause, there is the matter of the terms of the "guarantee," as embodied in the Order adopted today, which seems likely to generate litigation on its own. UPMC has never proposed an actual Board order itself. It challenged the order recommended by the administrative law judge. And now the Board modifies the recommended order in two respects: (1) by agreeing with UPMC that the "officers, agents, successors, and assigns" language must be deleted, because "it was not included in UPMC's offer;" and (2) by reciting that UPMC must provide the remedies ordered against Shadyside if Shadyside "fails" to do so—in contrast to the recommended Order, under which UPMC must act only if Shadyside "is unable to do so."

As to the first modification, the majority insists that is immaterial, because even without the language objected to by UPMC, the Board's Order still would bind "its officers, agents, successors, and assigns." But there is no certainty about that. For one thing, in a compliance proceeding UPMC or its "officers, agents, successors, and assigns" might argue that the absence of order language specifically reaching the latter individuals and entities forecloses the Board from seeking compliance by them, notwithstanding the majority's unsupported assurances to the contrary. After all, it is the Board's *order*, not the reasoning in its decision, which drives the compliance process. See Sec. 10596 of the Compliance Manual (Procedures To Follow Upon Issuance of Board Order: The Compliance Officer should initiate compliance action with its remedial provisions as soon as a Board order issues by: Providing respondent with a copy of the Board's *order* and requesting, in writing, that respondent begin to take steps to comply with the Board's *order*.) (emphasis added). Further, in the event a Board order finding violations of the Act is appealed to and enforced by a federal appellate court (and UPMC's express restriction of its guarantee to those violations "which survive the exceptions *and appeals process*" plainly suggests that voluntary compliance with the Board's ultimate order would be unlikely), those individuals and entities might reasonably argue that any attempt by the Board to pursue them would be tantamount to an impermissible post-enforcement modification of the order.[10]

But even putting aside those potential roadblocks, it is far from clear that there would be anything automatic about imposing liability on UPMC's "officers, agents, successors, and assigns." In *Regal Knitwear Co. v. NLRB*, 324 U.S. 9 (1945), the Supreme Court considered the enforceability of the Board's standard successors and assigns language, concluding that it could be justified, but that the Court would "not undertake to decide whether or under what circumstances any kind of successor or assign will be liable for violation of a Labor Board order. . . . (W)hether one brings himself in contempt as a 'successor or assign' depends on an appraisal of his relations and behavior and not upon mere construction of terms of the order." Id. at 14–15. The Court affirmed this approach in *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168 (1973), recognizing that Rule 65(d)[11] of the Federal Rules of Civil Procedure was "not a bar to judicial enforcement of the Board order entered against the bona fide successor in this case" but then considering whether the Board acted within its discretion by issuing the order against such a party, "striking a balance between the legitimate interests of the bona fide successor, the public, and the affected employee." Id. at 179, 181. In these cases, the Court seemed to signal that, far from broadly applying or inferring a "successors and assigns" clause, it would instead be cautious about the application of such language to entities that the Board seeks to hold liable.

Yet even if we are to assume the majority is correct that UPMC's successors and assigns still would be bound even absent express order language reaching those entities, it then makes no sense for the Board to delete such language at UPMC's urging. If, as the majority says, UPMC's successors and assigns would be bound in any event, there is no point in removing that language. UPMC obviously thought it important to insist on the removal of that language. Indeed, one must assume that, because the majority's statement about the Order's effect is contrary to UPMC's view, it might well trigger a challenge by UPMC to the order that the majority insists was agreed to by UPMC on one or more of the grounds above.

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[10] See *Scepter, Inc. v. NLRB*, 448 F.3d 388, 391 (D.C. Cir. 2006) ("The Board obviously cannot modify an order . . . that the court has enforced in a final judgment."); *NLRB v. Gimrock Construction, Inc.*, 695 F.3d 1188, 1192-1193 (11th Cir. 2012) (same); *Interstate Bakeries Corp.*, 360 NLRB 112, 112 fn. 4 (2014).

[11] This rule concerns which entities may be bound by an order.

As to the second modification, it alters a provision in the judge's recommended order to which UPMC never objected. The majority asserts that its modification—clearly a material change that strengthens the "guarantee"[12]—"better reflect[s] UPMC's guarantee." But UPMC has never consented to this modification and presumably might choose to challenge it as well. Moreover, this sua sponte alteration places the Board in the position akin to a party in the litigation, able to respond to proposed language and present counter-offers until a legally acceptable document is crafted. This strays far from the Board's recognized role as a neutral arbitrator. By doing so, the majority has encouraged parties to bargain with the Board rather than each other to settle their disputes. The majority does not dispute this observation, raising the question whether this is, in fact, their desired outcome.

In short, accepting UPMC's "guarantee" achieves very little with respect to effectuating either the Board's interest in private settlement or the central purpose of the Act: remedying unfair labor practices promptly, before labor disputes become even more disruptive.[13] This is especially so considering that the "guarantee" could have collateral consequences in any contemporaneous case where UPMC's relationship with Presbyterian Shadyside is or will be at issue. That is, inasmuch as the General Counsel here is prevented from seeking, and potentially securing, a single-employer finding, he would be required to try again in some other case—and potentially be confronted with a proffered "guarantee" again. In theory, under today's decision, any respondent confronted with a single-employer allegation will always have the option to proffer a manifestly inadequate "guarantee" like the one endorsed by the Board today—and thus might perennially avoid a single-employer finding, no matter the evidence and regardless of the General Counsel's determination that pursuing such a finding would effectuate the purposes of the Act.

III.

It should be clear, then, why both the General Counsel and the Charging Party have opposed UPMC's "guarantee." Of course, if either party had reached a true settlement with UPMC on the same terms, this would be a different case, and it would be proper to analyze it using the *Independent Stave* factors. And it could be, assuming that they were offered a settlement by UPMC, the General Counsel and the Charging Party made a mistake in turning it down, given the risks of litigation. But that decision should be theirs to make, at least in circumstances where, as here, a respondent's offer falls short of a complete remedy. (If the remedy were complete, then adjudicating the case would truly be a waste of time and resources).

Put somewhat differently, the Board should assume that the General Counsel and the Charging Party are rational actors. And it should be extremely reluctant—where no true settlement is involved—to abandon its role as an adjudicator, in favor of acting as a sort of super prosecutor ready to shape a deal with a respondent. In cutting off the General Counsel's path to the Board, today's decision seems to open a new path for respondents who wish to bargain directly with the Board itself. The majority's difficulty in crafting an Order that actually reflects what UPMC, alone, has consented to illustrates the pitfalls of this practice. Except in unusual circumstances, the Board should decide the cases brought to it, not settle them itself. The circumstances here do not justify a departure from the Board's normal role as an adjudicative body. Accordingly, I dissent.

Dated, Washington, D.C. December 11, 2017

Lauren McFerran, Member

[12] Under the language of the judge's recommended order, the General Counsel would have been required to prove that Shadyside was "unable" to comply with the Board's order—perhaps because it was defunct or bankrupt—before UPMC's remedial obligations could be triggered. It is no wonder that UPMC had no objection to this language.

[13] As the Board observed in *Independent Stave*, the "early restoration of industrial peace . . . is a fundamental aim of the Act." 287 NLRB at 743.

NATIONAL LABOR RELATIONS BOARD

Julie Stern Esq., for the General Counsel.
Thomas Smock, Esq., for the Respondent UPMC.
Betty Grdina, Esq., for the Charging Party.[1]

SUPPLEMENTAL DECISION

MARK CARISSIMI, Administrative Law Judge. On January 9, 2014, pursuant to charges filed by SEIU Health care Pennsylvania, CTW, CLC (the Union) the General Counsel issued, a second order further consolidating cases and amended consolidated complaint (the complaint) alleging that Respondent UPMC (UPMC) and Respondent UPMC PresbyterianShadyside (Presbyterian Shadyside) constitute a single employer and that Presbyterian Shadyside committed various violations of Section 8 (a)(4), (3), (2), and (1) of the Act. Thereaf-

[1] While the briefs filed by the Respondent and the Charging Party Union regarding Respondent UPMC's motion seeking dismissal of the complaint allegations alleging that it is a single employer with Respondent Presbyterian Shadyside list the names of several attorneys, I have listed only the attorneys who signed the briefs.

ter, both Respondents filed with the Board a motion to dismiss the complaint allegation that UPMC and Presbyterian Shadyside constitute a single employer. On February 7, 2014, the Board issued an order denying the Respondents' motion. Thereafter, on February 12, 2014, I opened a hearing that was conducted for 19 days during February, March, and April 2014. I issued an order on the record on April 3, 2014, severing the single employer allegations from the merits of the complaint. I determined it was appropriate under the circumstances to first issue a decision regarding the alleged unfair labor practices committed by Presbyterian Shadyside and later issue a supplemental decision regarding the issue of whether UPMC and Presbyterian Shadyside constitute a single employer. My reason for bifurcating the proceeding was that I did not want ongoing subpoena enforcement proceedings regarding the single employer issue to delay my resolution of the substantive unfair labor practice issues in the complaint.[2] On November 14, 2014, I issued a decision in this case (JD-62-14) in which I found that Presbyterian Shadyside committed various unfair labor practices. That case is presently pending before the Board pursuant to exceptions filed by all parties.

On June 4, 2015, UPMC filed with me a "Partial Motion to Dismiss" the complaint allegations that it constitutes a single employer with Presbyterian Shadyside and that it be dismissed as a party.[3] The General Counsel and the Union filed oppositions to the partial motion to dismiss filed by UPMC. Thereafter, with my permission, UPMC filed a reply to the oppositions filed by the General Counsel and the Union, and the General Counsel filed a response to the reply filed by UPMC. The briefs contained various attachments which the parties rely on in support of their respective positions. Since I find the briefs and the attachments to constitute a sufficient basis to issue a supplemental decision in this matter without further hearing, I order that the record be reopened for the limited purpose of receiving the briefs and attachments filed by the parties.

In its brief in support of its motion, UPMC requests that it be dismissed as a party in this matter and "that the severed single employer allegations of this matter also be resolved on the basis that Respondent UPMC shall guarantee the performance by Presbyterian Shadyside of any remedial aspects of the Decision and Order which survive the exceptions and appeal process." (UPMC br. at 5.) In UPMC's reply brief it repeats this offer by stating "UPMC has indicated that it guarantees the performance by Presbyterian Shadyside of any remedial aspects of the Administrative Law Judge's Decision and Order which survive the exceptions and appeal process. As such, UPMC would be responsible for any remedy along with Presbyterian Shadyside." (UPMC reply at 2.) In its motion, however, UPMC does not stipulate that it is a single employer with Presbyterian Shadyside.

In opposing UPMC's motion to dismiss the single employer allegations of the complaint, the General Counsel contends, inter alia, that because the evidence regarding the single employer issue has not been presented, there is no factual basis to evaluate the appropriateness of UPMC's guarantee that it will ensure that Presbyterian Shadyside complies with any order ultimately issued by the Board. The General Counsel also asserts that UPMC's offer to guarantee compliance with any remedial order that may ultimately be issued in this case is ineffective because it is made in the context of seeking to be dismissed as a party from this proceeding. The General Counsel further contends that a finding that UPMC and Presbyterian Shadyside constitute a single employer and are thus jointly and severally liable for the unfair labor practices committed is necessary in order to properly effectuate the policies of the Act.

The Union argues, inter alia, that there is an insufficient basis to accept UPMC's offer to guarantee compliance with the remedy for violations that the Board finds that Presbyterian Shadyside committed. The Union contends, in this regard, that no guarantee has been attached to UPMC's motion.[4] The Union further argues that dismissing the single employer allegation would be contrary to the law of case as, prior to the opening of the hearing, the Board issued an order denying a motion filed by UPMC in which it sought dismissal of the amendments to the complaint alleging it to be a single employer with Presbyterian Shadyside. The Union further argues that a finding that UPMC and Presbyterian Shadyside constitute a single employer is necessary to achieve complete remedial relief in this matter.

Attached to the Union's opposition is a stipulation that the General Counsel, the Union, and Respondents UPMC, UPMC Presbyterian Shadyside, and Magee-Women's Hospital of UPMC entered into in Case 06–CA–081896[5] (U. Exh. A) that sets forth basic information regarding the relationship between UPMC and Presbyterian Shadyside. According to the parties' stipulation, UPMC is a holding company that owns various subsidiaries which operate 20 hospitals in Pennsylvania, with the majority of them located in the Pittsburgh, Pennsylvania area. UPMC, through its various subsidiaries, also operates

[2] On February 24, 2014, I denied, in substantial part, petitions to revoke the subpoenas duces tecum that the General Counsel had served on UPMC and Presbyterian Shadyside, respectively, and a subpoena duces tecum that the Union had served on UPMC. Consequently, I ordered both the Respondents to produce documents pursuant to the subpoenas. Thereafter, the Respondents indicated they would not comply with my order. On March 24, 2014, on behalf of the Board, the General Counsel filed an application to enforce all three subpoenas in United States District Court for the Western District of Pennsylvania. On August 22, 2014, the district court issued an order granting the Board's application for enforcement of all three subpoenas, which it amended on September 2, 2014. The district court stayed its order pending an appeal by the Respondents. Thereafter, the Respondents appealed the district court's order to the Third Circuit Court of Appeals, where the matter is presently pending.

[3] Since the record has opened in this case and the single employer issue remains pending before me, I have jurisdiction to rule on the partial motion to dismiss. Secs. 102.35(a)(8) and 102.24(a) of the Board's Rules and Regulations.

[4] The offer made in UPMC's motion is, of course, binding on it. The Board has long held that statements made by counsel in the management of litigation are binding upon a party. *Performance Friction Corp*., 335 NLRB 1117, 1149 (2001); *Florida Steel Corp*., 235 NLRB 1010, 1011–1012 (1978). Accordingly, I find no merit in the Union's contention regarding this issue.

[5] Part of this case was settled and the remaining part was litigated before an administrative law judge. A decision issued on April 19, 2013 (JD-28-13), which is presently pending before the Board on exceptions.

over 400 clinical locations in Western Pennsylvania. UPMC, through its various subsidiaries, has over 55,000 employees. Presbyterian Shadyside is a subsidiary of UPMC and employs more than 9500 employees.

Having duly considered the positions of the parties I have determined that it would not effectuate the policies of to further litigate the issue and make a determination regarding whether UPMC and Presbyterian Shadyside constitute a single employer. I construe UPMC's willingness to serve as the guarantor of any remedy that ultimately may be issued by the Board in this case as consent that it undertake such action pursuant to a Board order. Accordingly, I have concluded that it is appropriate to dismiss the allegations in the complaint that UPMC and Presbyterian Shadyside constitute a single employer but, based on its asserted willingness to do so, order UPMC to ensure that Presbyterian Shadyside complies with any remedy that may be ordered by the Board in this case. I believe that this approach eliminates what I now believe to be unnecessary litigation over the single employer issue and addresses the concern of the General Counsel and the Union regarding the manner in which UPMC's guarantee will be enforced.

The Board has long recognized that under certain circumstances it does not effectuate the policies of the Act to find that a violation of the Act has occurred and issue a remedial order. *Bellinger Shipyards*, 227 NLRB 620 (1976); *Wichita Eagle & Beacon Publishing Co.,* 206 NLRB 55 (1973); *Square D Co.* 204 NLRB 154 (1973); *American Federation of Musicians, Local 76 (Jimmy Wakely Show),* 202 NLRB 620 (1973); *Kentile Inc.,* 145 NLRB 135 (1963); *Fabrica De Muebles Puerto Rico*, 107 NLRB 905 (1954). Although the circumstances in those cases differ from the instant one in that none of them involved a single employer allegation, the similarity is that the allegedly unlawful conduct that occurred in those cases had been substantially remedied by later conduct.

In the instant case, as noted above, UPMC is now proposing that the single employer allegation in the complaint be resolved on the basis that it guarantees compliance with any remedies the Board may issue regarding any unfair labor practices committed by Presbyterian Shadyside in the original decision in this case that is presently pending before the Board. It is important to note that the complaint does not allege that UPMC independently committed any of the unfair labor practices alleged in the complaint. In addition, there was no evidence presented at the trial that UPMC independently committed any unfair labor practices. Thus, any liability that UPCM would have for any of the unfair labor practices committed by Presbyterian Shadyside would be solely dependent upon a finding that it constitutes a single employer with Presbyterian Shadyside.

In my view, accepting UPMC's offer to serve as a guarantor and ensure that Presbyterian Shadyside complies with any remedies provided for in a Board order is an appropriate way to resolve the single employer allegation. In accepting this offer, I will dismiss the allegation in the complaint that UPMC and Presbyterian Shadyside constitute a single employer, but I will retain UPMC as a party to the case in order to ensure that there is a mechanism to enforce, if necessary, its willingness to serve as a guarantor for any remedies ordered by the Board.

To agree with the oppositions filed by the General Counsel and the Union, would result in the dismissal of the Respondent's motion and the continued litigation of the issue of whether UPMC and Presbyterian Shadyside constitute a single employer. At present, the single employer allegation in the complaint is being held in abeyance because a subpoena enforcement proceeding involving documents relevant to this question is pending in the Third Circuit. If the General Counsel prevails in all or part of the subpoena enforcement proceeding, UPMC and Presbyterian Shadyside would be required to produce relevant documents for inspection by the General Counsel and the Union. After that review, the General Counsel would file a motion with me seeking to resume the hearing on the single employer allegation.[6] After scheduling hearing dates, the litigation of the single employer issue would resume. Based on my knowledge of this case I estimate that such a hearing would last 4 to 5 days. After the filing of briefs I would, of course, issue a decision regarding the merits of the allegation that UPMC and Presbyterian Shadyside constitute a single employer. If I should find that UPMC and Presbyterian Shadyside, in fact, constitute a single employer, I would further find, consistent with Board law, that they are jointly and severally liable for the violations of the Act found in the underlying unfair labor practice case. *Naperville Jeep/Dodge*, 357 NLRB 2252, 2253 fn. 5 (2012); *Emsing's Supermarket, Inc*., 284 NLRB 302 (1987). If I should conclude that UPMC and Presbyterian Shadyside do not constitute a single employer I would dismiss the single employer allegation from the complaint and consequently UPMC would no longer be a party to the case. Of course, any decision that I would issue would be subject to appeal to the Board thus engendering further litigation of the single employer issue.

Accepting UPMC's offer to serve as a guarantor of any remedy that the Board may ultimately order against Presbyterian Shadyside and providing that UPMC do so pursuant to an order, in my view, is as effective a remedy as I would provide if I were to find UPMC and Presbyterian Shadyside to be a single employer and thus jointly and severally liable for the unfair labor practices I have found were committed by Presbyterian Shadyside. The great benefit to this approach is that this additional safeguard to ensure that employees ultimately achieve a full remedy in this case is obtained without the time consuming and expensive course of litigating the single employer issue to its conclusion. This benefit is also obtained without the risk that further litigation of the single employer issue may result in a finding that UPMC and Presbyterian Shadyside are not, in fact, a single employer. If such a conclusion were to be reached, UPMC would have no liability for the unfair labor practices committed by Presbyterian Shadyside.

As indicated above, the approach I have outlined above addresses the concerns of the General Counsel and the Union regarding the manner in which UPMC's guarantee that Presby-

[6] It is, of course, possible that the circuit court will not affirm the district court's order requiring the Respondent to produce documents pursuant to the subpoenas. Since the General Counsel issued a complaint alleging that UPMC and Presbyterian Shadyside constitute a single employer without the subpoenaed documents, I presume that, even in this scenario, the General Counsel would wish to continue to litigate the single employer issue.

terian Shadyside will comply with any final Board order will be enforced, if necessary.

I do not find persuasive any of the other reasons advanced by the General Counsel and the Union as to why I should not accept UPMC's offer to guarantee compliance with any remedy ordered and resolve the single employer allegations on that basis.

As noted above, the Union claims that the Board's February 7, 2014 Order denying UPMC's motion to dismiss it as a Respondent is the established law of the case and compels the denial of UPMC's instant partial motion to dismiss. In its motion filed with the Board before the commencement of the hearing in this case, UPMC asserted, inter alia, that with respect to the amended consolidated complaint which issued on January 9, 2014, alleging that UPMC and UPMC Presbyterian Shadyside constitute a single employer, there were no substantive allegations involving UPMC, there was no complaint allegation alleging that UPMC Presbyterian Shadyside could not fully remedy any violation found, and that litigating the single employer issue would take time and expense, and waste the resources of all parties without furthering the purposes of the Act. The Board's order indicated "The Respondents' Motion to Dismiss Amendments to the consolidated complaint is denied. The Respondents have failed to establish that the amendments are improper and that they are entitled to judgment as a matter of law." Clearly, the instant motion presents changed circumstances from those that UPMC relied on in filing its motion to dismiss with the Board. In the instant motion, UPMC seeks to dismiss the single employer allegation in the complaint on the basis that it is willing to serve as a guarantor and ensure that any remedy that the Board orders with respect to unfair labor practices committed by Presbyterian Shadyside are complied with. In filing its motion with the Board, UPMC did not make such an argument and accordingly the Board did not to consider it. In *Teamsters Local 75 (Schreiber Foods),* 349 NLRB 77 (2007), a case relied on by the Union in support of its position, the Board specifically indicated that changed circumstances may warrant departing from an initial order. Id. at 80. Accordingly, because of these changed circumstances that have occurred since the time of the Board's order of February 7, 2014, I do not find that order requires dismissal of the instant motion.

I further disagree with the Union's contention that in the present posture of this case the General Counsel possesses unreviewable discretion regarding the disposition of the single allegation in the complaint. In support of its position, the Union relies on *Sheet Metal Workers, Local 28 (American Elgen),* 306 NLRB 981 (1992). This case is factually inapposite because it involves the General Counsel's discretion to *withdraw* (emphasis supplied) a complaint after a hearing has opened but before any evidence has been introduced, when there is "no contention that a legal issue is ripe for adjudication on the parties' pleadings alone." Id. at 981. The instant case, of course, involves whether it is appropriate to *dismiss* (emphasis supplied) the single employer allegation of the complaint at this juncture based on a conclusion that further litigation of that issue would not effectuate the policies of the Act. In that context, I find that the Board's decision in *Sheet Metal Workers, Local 28*, supra, does offer some guidance on this issue. There, the Board indicated:

> At some point, however, a complaint may be said to have advanced so far into the adjudicatory process that a dismissal takes on the character of adjudication, and at that point the General Counsel no longer possesses unreviewable discretion in the matter. Thus, the Board has held that "where . . . relevant evidence has been adduced at a hearing, the General Counsel no longer retains absolute control over the complaint; and a subsequent motion to dismiss the complaint or any portion thereof is within the [administrative law judge's] discretionary authority." Id. at 982. (citations omitted)

The adjudication of the complaint in this case has progressed to the point that 19 days of hearing have been held and I have issued a decision on the substantive unfair labor practice allegations of the complaint. While not all of the evidence regarding the single employer allegation has been introduced, I find that the litigation has progressed to the point that UPMC's motion to resolve the single employer allegation on the basis of its offer to guarantee the remedy is appropriately within my authority to decide.

I find *Cincinnati Enquirer,* 298 NLRB 275 (1990), another case relied on by the Union, to be distinguishable from the instant matter. In that case, in a preliminary ruling, the administrative law judge concluded that a regional director was "without authority" to issue a complaint alleging a particular violation of Section 8(a)(5). The Board indicated the judge's statement was erroneous because the contents and issuance of a complaint are matters solely within the prosecutorial authority of the General Counsel. In the instant case, I recognize the General Counsel's unreviewable discretion to issue the single employer allegation of the complaint. I find, however, for the reasons that I set forth herein, that it does not effectuate the policies of the Act to continue the litigation on this issue, given UPMC's offer to guarantee compliance with any remedy ordered by the Board in this case, and therefore I shall dismiss that allegation of the complaint.

I also do not agree with the Union's argument that the Board's decision in *Three Sisters Sportswear*, 312 NLRB 853 (1993), supports the necessity of proceeding with the trial of the single employer allegations in order to achieve an appropriate remedy in this case.

Three Sisters involved a long and complex history of litigation. In summary, in a prior case, *Southland Knitwear, Inc.*, 260 NLRB 642 (1982), the Board found that Southland and Metropolitan, as a single integrated enterprise, committed violations of Section 8(a)(3), (2), and (1) including the discriminatory layoff of 83 employees. After the Board's decision, Southland and Metropolitan purportedly closed its operations in mid-September 1983. Thereafter, the General Counsel received information that those entities were still operating, but under the following names: *Three Sisters Sportswear Co.; Three Sisters Apparel Corp.; Bedford Cutting Mills Co.; Metropolitan Sweater Industries, Inc.; United Knitwear Industries, Inc.; United Knitwear Industries, Ltd.;* and *Skylight Fashions, Inc. d/b/a Skylight Trading*. Consequently, in June 1989, the General Counsel issued a backpay specification claiming that all of the above-named corporations were a single employer and alter

ego with Southland and Metropolitan and that all of those corporations were jointly and severally liable for back pay owed under the Board's order in *Southland Knitwear Inc*. In addition, in June 1991, the General Counsel issued a new complaint against the above-named corporations and 144 Spencer Realty Corp. (Spencer), alleging that all of these corporations were a single employer and had committed additional various violations of Section 8(a)(4), (3), and (1).

In March 1992, the parties entered into a stipulation in the compliance case providing that all of the named respondents named in the backpay specification and Spencer were jointly and severally liable for the full amount of the backpay owned by Southland and Metropolitan pursuant to the Board's order in *Southland Knitwear Inc.* The stipulation did not contain an admission that the corporations were a single employer or alter egos to each other or to Southland or Metropolitan.

In the unfair labor practice proceeding on the new complaint in *Three Sisters Sportswear*, the administrative law judge rejected a contention made by the respondents that the single employer issue should also not be decided during the unfair labor practice proceeding but should be deferred, if necessary, to a compliance proceeding in that case. In so finding, the judge noted that the relationship between the companies had already been extensively litigated at the hearing and that postponing a decision on the issue would require duplication of such litigation in the event that the respondents did not comply with the decision in the unfair labor practice proceeding. In addition, the judge decided that the connection between the named respondents and Southland and Metropolitan must be decided in order to determine the propriety of special remedies requested by the union. 312 NLRB at 857. In reaching this conclusion, the judge noted that the owners of Southland and Metropolitan carried out their unlawful threat to close the facility, but then reopened again under the new corporate names set forth above in order to avoid their responsibilities under the Act. Id. at 862.

I find the circumstances in *Three Sisters* to be quite different from those that exist in the instant case and thus find it to be distinguishable. In the first instance, in *Three Sisters,* the evidence regarding the complicated relationship between the various companies had already been presented at the unfair labor practice hearing. In addition, *Three Sisters* involved a situation where the owners of a relatively small facility with approximately 150 employees engaged in egregious violations of the Act and then attempted to evade their obligations to remedy that conduct by purportedly closing the facility and then reopening and operating it under a variety of corporate names. Thus, the case involved a history presenting the possibility of remedial failure.

In the instant case, the evidence regarding whether UPMC and Presbyterian Shadyside constitute a single employer has yet to be fully presented and accepting the proposal of UPMC avoids such expensive and time-consuming litigation. Both Presbyterian Shadyside and UPMC are substantial entities. Presbyterian Shadyside employs approximately 9500 employees and UPMC, through its subsidiaries, has approximately 55,000 employees. There is no evidence to suggest that there is a real possibility that Presbyterian Shadyside would be unable to effectuate any remedies ordered by the Board. Despite that, in order to avoid litigation of the single employer issue, UPMC is willing to guarantee that its subsidiary, Presbyterian Shadyside, will comply with any remedies ordered by the Board. Accordingly, I do not find that the Board's decision in *Three Sisters* supports the necessity of proceeding to further litigate the single employer issue in this case.

On the basis of the foregoing, I have concluded that it is appropriate to accept the proposal of UPMC that it be the guarantor of any remedy that the Board may order in the original decision in this case (JD-62-14) and I will issue an order requiring it to do so. On that basis, I have determined that it would not effectuate the policies of the Act to continue to continue to litigate the complaint allegation that UPMC and Presbyterian Shadyside constitute a single employer and I therefore dismiss that allegation in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, UPMC, its officers, agents, successors, and assigns, shall be the guarantor of any remedies that the Board may order in the original decision in this case (JD-62-14). As the guarantor, Respondent UPMC must ensure that Respondent UPMC Presbyterian Shadyside takes all steps necessary to comply with any remedies that may be contained in the Board's Order, including providing for any such remedies itself, if UPMC Presbyterian Shadyside is unable to do so.

IT IS FURTHER ORDERED that the allegation in the complaint that Respondent UPMC and Respondent UPMC Presbyterian Shadyside constitute a single employer is dismissed as, under the circumstances, it would not effectuate the policies of the Act to continue to litigate and reach a decision regarding that allegation.

Dated, Washington, D.C., July 31, 2015.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

UPMC and its Subsidiary, UPMC Presbyterian Shadyside, Single Employer, d/b/a UPMC Presbyterian Hospital and d/b/a UPMC Shadyside Hospital *and* SEIU Healthcare Pennsylvania CTW, CLC. Cases 06–CA–102465, 06–CA–102494, 06–CA–102516, 06–CA–102518, 06–CA–102525, 06–CA–102534, 06–CA–102540, 06–CA–102542, 06–CA–102544, 06–CA–102555, 06–CA–102559, 06–CA—104090, 06–CA–104104, 06–CA–106636, 06–CA–107127, 06–CA–107431, 06–CA–107532, 06–CA–107896, 06–CA–108547, 06–CA–111578, and 06–CA–115826

August 27, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

On November 14, 2014, Administrative Law Judge Mark Carissimi issued the attached decision.[1] The Respondents UPMC and UPMC Presbyterian Shadyside (Presbyterian Shadyside or Respondent) each filed exceptions and supporting briefs. The General Counsel and the Charging Party Union, SEIU Healthcare Pennsylvania CTW, CLC, filed briefs in response to the Respondents' exceptions. Respondent UPMC filed a reply. The General Counsel and the Charging Party filed limited exceptions and supporting briefs, and the Respondents each filed a brief in response. The General Counsel filed a reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[2] and has decided to adopt the judge's rulings,[3] findings,[4] and conclusions in former employees (B-720514 and B-720523), and two Union organizers (B-720525 and B-720526); (2) the January 24, 2014 order granting the petition to revoke subpoena duces tecum issued by the Respondent Presbyterian Shadyside to Fair Share Pittsburgh Action Fund (B-720529); (3) the February 11, 2014 order denying Respondent Presbyterian Shadyside's motion for reconsideration of the judge's January 29, 2014 order granting the petition to revoke; and (4) the February 11, 2014 order further granting the petitions to revoke with regard to production of electronically stored information.

In granting the petitions to revoke and denying the motion for reconsideration, the judge found that Respondent Presbyterian Shadyside failed to show the relevance of certain requested items. Specifically, the judge found that the motive behind the Union's campaign, the Union's relationship with Fair Share Pittsburgh, and documents concerning the Union's response to an event that occurred at another UPMC property not at issue in this case are not relevant to whether Respondent Presbyterian Shadyside violated the Act as alleged. The judge also found unduly burdensome the subpoenas' request for all electronically stored information possessed by the Union.

Having reviewed the record, we find that Respondent Presbyterian Shadyside has failed to show that the judge abused his discretion in revoking, in part, the Respondent's subpoenas. In affirming the judge's order revoking the subpoenas in part, we also rely on *McDonald's USA, LLC,* 363 NLRB No. 144, slip op. at 1, 13 (2016) (affirming the judge's order to revoke a subpoena and finding that motive of the union's campaign is not relevant to the underlying issues in the case). And we note that *Bettie Page Clothing,* 359 NLRB 777, 777–778 (2013), cited by the judge in his order denying the Respondent's motion for reconsideration, was incorporated by reference in 361 NLRB 876 (2014), remanded on other grounds 688 Fed. Appx. 3 (D.C. Cir. 2017).

Regarding the Respondent's request for electronically stored information, we affirm the judge's reliance on the factors set forth in the *Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, Second Edition (The Sedona Conference Working Group Series, 2007), and we find that the judge did not abuse his discretion by finding that the request was burdensome, and revoking the subpoenas to the extent that they asked for all electronically stored information. However, we do not rely on the judge's citation to *CNN America, Inc.,* 352 NLRB 675 (2008), a case decided by a two-member Board. See *New Process Steel, L.P. v. NLRB,* 560 U.S. 674 (2010).

[4] Respondent Presbyterian Shadyside has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, several of Respondent Presbyterian Shadyside's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that those contentions are without merit.

In the absence of exceptions, we adopt the judge's findings that Respondent Presbyterian Shadyside violated Sec. 8(a)(1) by the following conduct: on or about February 2013, requiring employee Leslie Poston to remove her union pin; on or about February 19, 2013, requiring employee David Jones to remove his union pin; on or about February 21, 2013, requiring Jones to remove his union pin and threatening him with discipline if he continued to wear union insignia; and on or about April 15, 2013, taking the following actions against employee Albert Turner: demanding that Turner consent to having his photograph taken while he was wearing union insignia, subsequently taking such a photograph, and asking him why he continued to wear his Union pin; responding to Turner's question about whether he was going to be disci-

[1] By motion dated May 12, 2015, the General Counsel requested that Case 06–CA–102566, pertaining to the discharge of employee Finley Littlejohn, be severed from the above-captioned cases and remanded to the Regional Director for Region 6 for further processing pursuant to a non-Board settlement agreement between Respondent UPMC Presbyterian Shadyside and the Charging Party. On September 14, 2015, the Board issued an Order granting the General Counsel's request. The case caption has been amended to reflect the severance of the case.

[2] Respondent Presbyterian Shadyside has requested oral argument, and Respondent UPMC has incorporated Presbyterian Shadyside's exceptions and brief by reference. The request is denied as the record, exceptions, cross-exceptions and briefs adequately present the issues and the positions of the parties.

[3] Respondent Presbyterian Shadyside excepts to the following orders of the judge: (1) the January 29, 2014 order granting in part the petition to revoke subpoenas duces tecum issued by the Respondent Presbyterian Shadyside to the Charging Party (B-720528), current and

part, to reverse them in part, to revise the recommended remedy,[5] and to adopt the recommended Order as modified and set forth in full below.[6]

I. BACKGROUND

UPMC operates a 9000-employee acute-care hospital located in Pittsburgh, Pennsylvania. It has two facilities, Presbyterian Hospital and Shadyside Hospital, which are located adjacent to each other. In the spring of 2012, the Union began a campaign to organize the approximately 3500 nonclinical support employees employed at Presbyterian Shadyside. At issue in this case are the substantive allegations of the Second Amended Consolidated Complaint (the Complaint), which allege that Respondent Presbyterian Shadyside (hereinafter "the Respondent") engaged in multiple violations of Section 8(a)(1), 8(a)(2), 8(a)(3), and 8(a)(4) of the Act.[7]

The judge found that the Respondent violated Section 8(a)(1) by prohibiting employees from wearing union insignia, prohibiting employees from posting union materials on its bulletin boards, and threatening and interrogating employees engaged in union activity. The judge also found that the Respondent violated Section 8(a)(2) and (1) in regard to the formation and operation of the Environmental Support Services (ESS) Employee Council. Finally, the judge found that the Respondent violated Section 8(a)(3) and (1) and/or 8(a)(4) and (1) by issuing discipline culminating in final written warnings to three employees and discharges of four other employees.[8] We adopt most of the judge's findings, with some modifications and clarifications explained below, but we reverse his findings with respect to the discipline and subsequent alleged threat to employee Felicia Penn.

II. DISCUSSION

A. 8(a)(1) Allegations

We agree with the judge for the reasons stated in his decision that the Respondent violated Section 8(a)(1) by: (1) prohibiting employee Jamie Hopson from wearing a union button in immediate patient care areas, while al-

plined for continuing to wear his union pin by saying that the matter was being investigated and that the Respondent could not be sure what would happen; and on April 16, 2013, telling Turner that the Respondent wanted to photograph the union pin that Turner was wearing and directing Turner to write a statement about why he was continuing to wear his union pin.

Similarly, in the absence of exceptions, we adopt the judge's dismissal of the following allegations: that, on May 14, 2013, the Respondent prohibited employees from soliciting on behalf of the Union; that, on or about February 14, 2013, the Respondent created an unlawful impression of surveillance through a supervisor's statement to open Union supporter Felicia Penn; that, on March 2, 2013, the Respondent violated Sec. 8(a)(3) by issuing a written warning to employee David Jones, asserting that Jones had taken an unauthorized break; that, in mid-February 2013, the Respondent unlawfully threatened employee James Staus by telling Staus that he did not need a union as it "takes all your money in union dues and people hate it"; and that, on February 21, 2013, the Respondent violated Sec. 8(a)(1) by threatening to arrest employees and nonemployee union representatives who were engaged in union activity in the hospital cafeteria. We also adopt, in the absence of exceptions, the judge's refusal to consider the allegations that in February 2013 the Respondent violated Sec. 8(a)(1) by requiring employee Chaney Lewis to remove his union lanyard, and that, in mid-March 2013, the Respondent violated Sec. 8(a)(1) by requiring employee Bonita McWhirter to remove her union lanyard and union pin.

[5] Contrary to the judge, we agree with the General Counsel and the Union that a 120-day notice posting period is warranted in the circumstances of this case. See Amended Remedy discussion, below. Member Emanuel dissents from this 120-day posting period, as discussed further in the Amended Remedy section, as well as from the notice-reading remedy ordered by the judge. While serious, he does not find the violations in this case to be of such an egregious nature as to warrant these extraordinary remedies.

[6] We shall modify the judge's recommended Order in accordance with our decision in *AdvoServ of New Jersey, Inc.,* 363 NLRB No. 143 (2016), and to conform to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified. In accordance with our decision in *King Soopers, Inc.,* 364 NLRB No. 93 (2016), enfd. in relevant part, 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondent to compensate affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

[7] The Complaint names both UPMC and its subsidiary, UPMC Presbyterian Shadyside, as Respondents, and asserts that they are a single integrated enterprise and a single employer. The judge severed the single integrated enterprise/single employer allegation and subsequently granted a motion to dismiss it after UPMC offered to "guarantee the performance by Presbyterian Shadyside of any remedial aspects of the Administrative Law Judge's Decision and Order [that] survive the exceptions and appeal process" and stated that it "would be responsible for any remedy along with Presbyterian Shadyside." The Board affirmed the judge's decision, finding that UPMC's remedial guarantee in exchange for the dismissal of the single employer allegation against UPMC was reasonable. *UPMC*, 365 NLRB No. 153 (2017). The Board retained UPMC as a party solely for the purpose of ensuring enforcement of UPMC's guarantee of the remedies, if any, ultimately ordered against Presbyterian Shadyside. Id., slip op. at 11. Members Pearce and McFerran jointly dissented from the Board's decision, finding that UPMC's "guarantee" did not constitute an adequate remedy. They adhere to that view.

[8] The judge additionally found that the Respondent violated Sec. 8(a)(1) of the Act by denying nonemployee union organizers access to the hospital cafeteria, engaging in surveillance of employees who were talking to the union organizers in the cafeteria, and requiring employees who were in the cafeteria with the union organizers to produce their identification. We shall sever and retain those allegations for subsequent consideration by the Board.

Member Pearce dissents to the severance of these allegations. The judge's findings that the Respondent violated Sec. 8(a)(1) by denying nonemployee union organizers access to its public cafeteria, surveilling employees and requiring identification from employees who spoke to organizers in the cafeteria, are fully supported by well-settled precedent. Because the allegations have been severed for subsequent consideration by the Board, Member McFerran expresses no view as to their merits.

lowing other employees to wear non-work related buttons in those areas;[9] (2) threatening employee Jynella Everett that her union activities could adversely affect her upcoming performance appraisal;[10] and (3) prohibiting employees from posting union materials on hospital bulletin boards, while allowing a company-sponsored labor organization to do so.

B. Allegations Relating to Employee Chaney Lewis

We agree with the judge for the reasons he stated that the Respondent violated Section 8(a)(3) and (1) by issuing a final written warning to employee Chaney Lewis for posting suspected union-related materials on hospital bulletin boards, while allowing the Respondent-sponsored labor organization, the ESS Employee Council, to post its literature,[11] and further violated Section 8(a)(1) by requiring Lewis to write a statement about his posting activity.[12]

C. Allegations Relating to Employee Leslie Poston's Email Message

We agree with the judge for the reasons stated in his decision that the Respondent violated Section 8(a)(3) and (1) by suspending employee Leslie Poston and issuing her a final written warning for sending a mass email related to union matters—specifically, about the reinstatement of employees Ronald Oakes and Frank Lavelle pursuant to a settlement of previous unfair labor practice charges.[13] Similarly, we adopt the judge's findings that the Respondent violated Section 8(a)(1) by requiring Poston to write a statement about her email; interrogating Oakes about his involvement with the letter and email; and interrogating Lavelle about the mass email, demanding that he write a statement about it, and threatening him with disciplinary action if he failed to cooperate with the Respondent's investigation of the email incident.[14]

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[9] Member Emanuel finds it unnecessary to pass on this allegation. The judge found, and the Board adopts in the absence of exceptions, a number of other 8(a)(1) violations based on the Respondent's restrictions of union buttons and insignia, so finding the additional violation would not materially affect the remedy.

[10] As explained by the judge, the credited testimony establishes that, on the same day that Everett wore a union badge pull for the first time, supervisor Jason Hogan stopped her in the hall and asked whether she knew her evaluation was coming up. Everett replied that she did, at which point Hogan looked down at Everett's badge pull and repeated, "Okay, I'm just letting you know your evaluation is coming up." Everett thereafter removed her union badge pull. Contrary to our dissenting colleague, we agree with the judge that a reasonable employee would understand that Hogan's comment, coupled with his nonverbal cues, was clearly directed at Everett's show of union support and implied that such support could adversely affect her evaluation. See, e.g., *Print Fulfillment Services LLC*, 361 NLRB 1243, 1272 (2014) (veiled threat of possible repercussions due to union activity found to violate Sec. 8(a)(1)).

Member Emanuel finds his colleagues' analysis unpersuasive, and would dismiss the allegation. As *Print Fulfillment* itself makes clear, neither Hogan's intent nor Everett's subjective perception of his remark or conduct is relevant. See id. at 1271 ("The Board does not consider either the motivation behind the remark or its actual effect.") The only question is whether a reasonable employee would feel threatened by Hogan's actions under the circumstances presented. Hogan did not mention the Union or other protected activity during his brief encounter with Everett, and in Member Emanuel's view, a reasonable employee would not feel threatened or coerced by his actions.

[11] We do not pass on the judge's finding that the Respondent also violated Sec. 8(a)(4) by disciplining Lewis because finding the additional violation would not materially affect the remedy. Member Emanuel joins in finding the 8(a)(3) violation for the same reasons discussed in fn. 13, infra.

[12] We adopt the judge's finding, for the reasons he stated, that the Respondent violated Sec. 8(a)(1) by requiring employee Lewis to prepare a written statement about his union activity. Contrary to our colleague, it is no defense that the Respondent was merely investigating a potential rule violation. Where, as here, the Respondent permitted bulletin-board postings by the ESS labor organization, its invocation of the rule against Lewis for posting union-related material was itself discriminatory and unlawful. And the Respondent's requiring Lewis to document his union activities in the course of its investigation into those activities would reasonably tend to coerce him in the exercise of his Sec. 7 rights.

Member Emanuel would dismiss the judge's finding that requiring Lewis to write a statement violated the Act. In his view, employers have a legitimate interest in investigating potential violations of their rules and policies. Thus, a reasonable employee in Lewis's position would not feel coerced because the employee would understand that the Respondent was only requesting the statement in connection with such an investigation.

[13] Member Emanuel observes that the Respondent's email policy itself was not alleged to be unlawful, so the Board's decision in *Purple Communications, Inc.,* 361 NLRB 1050 (2014), is not at issue here. Member Emanuel adopts the violation only on the basis that the evidence shows that the Respondent treated Poston in a discriminatory manner in its application of the policy. Specifically, the policy states that employees are to use the hospital's IT system only for "authorized activities," defined as "related to assigned job responsibilities and approved by the appropriate UPMC management." The policy allows only de minimis use for nonwork related activities. Here, the Respondent disciplined Poston for using a hospital listserv named "NU ALL," which went to over 2000 individuals, to send a union-related email. Although the Respondent asserted that it was the mass nature of the email rather than its subject matter that resulted in Poston's suspension and receipt of a final written warning, the evidence shows that the Respondent had not disciplined four other employees who had used "NU ALL" or otherwise sent a nonwork-related, nonunion-related email to more than 2000 individuals. Under these circumstances, Member Emanuel agrees that the Respondent's discipline of Poston violated Sec. 8(a)(3) and (1).

[14] Member Emanuel would dismiss all of the allegations regarding the Respondent's questioning of and attempts to obtain statements from Poston, Oakes, and Lavelle. Poston's email, which certainly appeared to be (and was ultimately found by the Respondent to be) a violation of the Respondent's email policy, was in the form of a letter from Oakes and Lavelle. As Member Emanuel stated in footnote 12 above, employers have a legitimate interest in investigating potential violations of their rules, and he believes that the Respondent was engaged in a lawful pursuit of that interest in questioning Poston, Oakes, and Lavelle. His colleagues are mistaken in stating that the Respondent had already "conclusively determined to discipline" all three employees before questioning them or asking them to provide a statement. Although the

D. Other 8(a)(3) Allegations

We agree with the judge for the reasons stated in his decision that the Respondent violated Section 8(a)(3) and (1) by issuing a final written warning to employee Albert Turner and subsequently terminating him. As to employee James Staus, we adopt the judge's findings that the Respondent violated Section 8(a)(3) and (1) by: (1) issuing him a verbal warning for wearing union-related insignia; (2) issuing him a verbal warning for posting union literature on the refrigerator in the break room and/or distributing union literature in the employee break room, and/or posting union-related materials on the bulletin board in the dock area;[15] and (3) placing him on a performance improvement plan and then discharging him.[16] Regarding the discharge of employee Ronald Oakes, we adopt the judge's finding that the Respondent violated Section 8(a)(4), (3) and (1) of the Act by discharging him, but in doing so, we do not rely on the judge's statement that the Respondent did not follow its progressive discipline policy in regard to Oakes' termination. We find, based on Oakes' own testimony, that he was reinstated at the final written warning stage, not the written warning stage.

E. 8(a)(2) Allegation

The judge found that the Respondent's Environmental Support Services (ESS) Employee Council was a labor organization within Section 2(5) of the Act, and that the Respondent dominated or interfered with the formation or administration of the council, thereby violating Section 8(a)(2) of the Act. We agree.

1. Labor organization status

The judge's finding that the ESS Employee Council was a labor organization is well-supported by the record. The facts are largely undisputed and set forth in full in the judge's decision.

Section 2(5) of the Act broadly defines "labor organization" as "*any organization of any kind* . . . in which employees participate and which exists for the purpose, *in whole or in part*, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work" (emphasis added).

There is no dispute that the ESS Employee Council is an "organization . . . in which employees participate." Further, we agree with the judge that a purpose of the council is "dealing with" the Respondent. "The concept of 'dealing with' essentially involves a bilateral process, ordinarily entailing a pattern or practice by which a group of employees makes proposals to management, and management responds to these proposals by acceptance or rejection by word or deed." *EFCO Corp.*, 327 NLRB 372, 375 (1998), enfd. 215 F.3d 1318 (4th Cir. 2000). The facts indicate that bilateral dealings occurred between the ESS Employee Council and the Respondent's director of environmental services, Dan Gasparovic, on a number of issues, including (1) the provision of bulletin boards to post materials regarding the "hoarding" of mop heads and distribution of the proper amount of cleaning chemicals, (2) the failure of employ-

request for a statement from Poston occurred after her suspension, the suspension was a suspension *pending investigation*. The judge did not find, nor is there any evidence in the record, that the Respondent had already decided to issue Poston a final written warning at the time it requested the statement. As to Oakes, the Respondent questioned him on March 4, but he was not discharged until March 20, and the judge did not find—and the record clearly contradicts—any notion that the Respondent had even considered terminating Oakes before March 10 or 11. Finally, as for Lavelle, he was not even the subject of any discipline during this case.

We disagree with our dissenting colleague. First, the Respondent was not engaged in a lawful investigation of potential rule violations where, as here, it invoked those rules in a discriminatory manner against union activity. Second, even assuming arguendo that the Respondent's conduct—which was directed at two employees who had recently been reinstated pursuant to a settlement agreement and a third who sent out a statement on their behalf declaring their continued allegiance to the union campaign—was the product of a legitimate investigation, it nonetheless violated the Act because of its doubtless coercive effect on the employees' Sec. 7 activities. As to all three employees, the Respondent had already conclusively determined to discipline them for the conduct they had engaged in before questioning them and/or directing them to provide written statements about their union activity. The Respondent already had Poston's challenged email message, which celebrated the reinstatement of the previously discharged Oakes and Lavelle, and had determined the computer from which it was sent before questioning Poston about the incident and directing Poston and Lavelle to each provide written statements about this union activity. In these circumstances, the Respondent's probing into the employees' Sec. 7 activities would undoubtedly have a coercive effect. This coercive effect would be even more pronounced from the questioning of Oakes. After Oakes replied affirmatively to department manager Touray's question whether Oakes knew about Poston's email, Touray asked how Oakes felt about Poston having sent the email out under Oakes' name. This latter question would elicit one of two responses, either of which would reasonably tend to coerce Oakes in the exercise of his Sec. 7 rights. If Oakes responded that he did not approve of Poston's actions, he might fear that he was bolstering the disciplinary case against Poston; conversely, if he expressed approval or a lack of concern about Poston's attribution, he might be viewed as complicit in Poston's actions.

[15] Member Emanuel adopts the judge's findings regarding the verbal warnings to Staus only to the extent that these warnings were for wearing union insignia and distributing union material in the employee break room. He finds it unnecessary to pass on the remainder of the allegations because the additional findings would not materially affect the remedy.

[16] We find it unnecessary to pass on the judge's additional findings that the Respondent violated Sec. 8(a)(1) by asking Staus if he was "coming out" after a supervisor observed Staus wearing union insignia, and by asking him about whether he had distributed union literature. We find that these additional violations would not materially affect the remedy.

ees to return cleaning carts to the appropriate designated areas, (3) the dispatcher calling employees with their next assignment while employees were still on their lunch breaks, and (4) the implementation of an Employee of the Month Award.

These dealings were over statutory terms and conditions of employment, as Section 2(5) requires, the most notable example being the Employee of the Month Award, which includes a $25 bonus. See *Electromation, Inc.,* 309 NLRB 990, 997 (1992), enfd. 35 F.3d 1148 (7th Cir. 1994) (bonuses and other monetary incentives are clearly working conditions); *Postal Service,* 302 NLRB 767, 776 (1991) (similar). While $25 is a modest amount, the Board does not require that bonuses be of significant value, and in general has taken a broad view of statutory subjects under Section 2(5). See, e.g., *E.I. du Pont & Co.,* 311 NLRB 893, 894 (1993) (incentive awards for safety and benefits such as employee picnic areas and jogging tracks are all terms and conditions of employment). Also notable is the ESS Employee Council's request that management speak to the dispatchers about contacting employees with their next assignment while employees were still on their lunch break. Gasparovic responded to this request by saying that he would speak to the dispatcher and supervisors involved. Thereafter, the dispatchers for the most part stopped calling employees during their lunch breaks.

The Respondent argues that the ESS Employee Council discussed only quality and efficiency issues with the Respondent, not considered "conditions of work." See *Webcor Packaging, Inc.,* 319 NLRB 1203, 1205 (1995), enfd. 118 F.3d 1115 (6th Cir. 1997), cert. denied 522 U.S. 1108 (1998) (issues of production problems and plant efficiency are not terms and conditions of employment); *Polaroid Corp.,* 329 NLRB 424, 425 fn. 4 (1999) (same). In *Electromation*, the Board rejected a similar argument based on the lack of evidence that the purpose of the committees at issue "was *limited to* achieving 'quality' or 'efficiency.'" 309 NLRB at 997 fn. 28 (emphasis added). Similarly, there is no evidence here that the purpose of the ESS Employee Council was limited to quality and efficiency concerns**.** Such issues as the Employee of the Month Award and the request that the dispatcher not contact employees at lunch are clearly terms and conditions of employment. For these reasons, as well as others cited by the judge, we adopt the judge's finding that the ESS Employee Council was a "labor organization" within Section 2(5) of the Act.[17]

[17] The Respondent also argues that the ESS Employee Council was not a "labor organization" because of the lack of evidence that employees "viewed the Council" as representing them with respect to wages, hours, or other conditions of employment. The Board has held that employees' perceptions are entitled to little weight in determining labor organization status. See *Electromation*, 309 NLRB at 997 fn. 27.

2. Domination/Interference

We also adopt the judge's finding that the Respondent dominated or interfered with the formation or administration of the council or contributed financial or other support to it. Contrary to our colleague, we find that the judge's decision is well supported by the record.

The impetus for the ESS Employee Council came from the Respondent's vice president for operations, John Krolicki, who decided to create the council. The Respondent determined that the council would be made up of department manager Dan Gasparovic and employee volunteers, who were solicited to participate by the Respondent. The Respondent chose the time and place—the manager's conference room—for the first meeting. At this meeting, the Respondent presented the employees with prepared bylaws. Gasparovic told employees that the purpose of the council was team building and morale, and that he would serve as a liaison with upper management to see whether their proposals were feasible. The employees were paid for attending this and all subsequent meetings, which continued to be held in the manager's conference room.[18]

At the second meeting, without any vote or input from the council members, Gasparovic informed them that employee Janine Graham would serve as the council's chair, and that two other named employees would serve as co-chairs.

At every monthly meeting held by the Respondent in its environmental support services department, the Respondent set aside time for Graham to report on the activities of the council, including the Employee of the Month Award. Council meeting minutes were prepared by the Respondent, and then posted on department bulletin boards in both the Presbyterian and Montefiore buildings.

Finally, we agree with the judge's findings that the Respondent contributed "financial or other support" to the ESS council, including extensive financial and logistical support of the council's efforts to put on a Memorial Day picnic and to develop and maintain the Employee of the Month Award. The judge's comprehensive factual findings are not disputed.

In sum, "when the impetus behind the formation of an organization of employees emanates from an employer and the organization has no effective existence independ-

[18] Although our dissenting colleague correctly notes that, under *Electromation,* paying employees for their meeting time and supplying meeting space will not alone establish unlawful contribution of financial support, they are facts that support a finding of employer domination or contribution of unlawful support. See 309 NLRB at 998 fn. 31.

ent of the employer's active involvement, a finding of domination is appropriate." *Electromation,* 309 NLRB at 996 (citing long line of cases). We agree with the judge that such is the case here, and we affirm his finding that the Respondent's conduct violated Section 8(a)(2).[19]

F. Felicia Penn: Final Written Warning and Related Statement

1. 8(a)(3) allegation

Contrary to the judge, we find that the Respondent did not violate Section 8(a)(3) of the Act by issuing a final written warning to anesthesia technician Felicia Penn. Assuming arguendo that the General Counsel met his initial burden under *Wright Line,*[20] we find that the Respondent met its burden to prove that it would have disciplined Penn even in the absence of her union activities.

It is undisputed that Penn was the designated overtime technician on the evening of November 28, 2012. She was thus required to stay over and provide additional help for the next shift if the volume of work required it. It is further undisputed that she left the hospital that night with four potential organ transplants pending. Penn herself acknowledged both at the time and multiple times on the witness stand that there was "a potential for disaster" if all the transplants took place. Another indication that Penn was aware that by leaving she was neglecting her responsibilities is that she initially lied about whether she had worked overtime that night. When supervisor Jane Hackett asked Penn the next day why she did not stay and work overtime, Penn falsely claimed that she had—an assertion that, as the judge noted, was flatly contradicted by the time clock, which showed that she left at 7:04 p.m. Curtaccio, who had no obligation to stay when her shift ended at 7 p.m., testified that she stayed over because she "didn't feel comfortable leaving," and thought the workload was too much for the two remaining technicians to handle. In short, Curtaccio testified, "I felt she shouldn't have left."

Despite this evidence, the judge found that the Respondent had failed to meet its rebuttal burden under *Wright Line* primarily because: (1) the Respondent failed to produce an appropriate "comparator," i.e., an employee who was not a union activist who had engaged in similar behavior and had not been disciplined; and (2) there was no effect on patient care because none of the four transplants pending when Penn left the hospital ultimately took place—in other words, "no harm, no foul."[21]

We do not find either of these arguments persuasive. First, we are not persuaded by the judge's reliance on the fact that there was "no effect on patient care," which is plainly a post hoc rationalization for Penn's negligence. The fact that none of the transplants ultimately took place was entirely fortuitous; not only Penn but, more importantly, the patients, were extraordinarily fortunate that the "disaster" that Penn admittedly knew was possible when she left the hospital did not come to pass.

As to the judge's other rationale, it is certainly understandable that the Respondent was not able to produce evidence of another anesthesia technician who had left the hospital with multiple transplants pending despite being the designated overtime person—or any other employee conduct comparable to Penn's behavior. The judge gives far too much weight to the Respondent's ostensible failure to define with precision and identify other employees who were disciplined for engaging in "work negligence." As an initial matter, although the formal disciplinary document used the term "work negligence," Penn was repeatedly told that her offense was "job abandonment"—a readily understandable term. Moreover, negligence is commonly understood to be a "failure to exercise the care that a reasonably prudent person would exercise in like circumstances."[22] Penn clearly failed to exercise such care when, as the designated overtime person, she left her coworkers to cope with a "potential disaster" if the pending transplants went through.

Penn's final written warning also cites the "inappropriate behavior and demeanor" exhibited by Penn during a conversation with her supervisor 2 days after she failed

[19] Contrary to our dissenting colleague, we find little relevance in the fact that the council ceased operating when the employees lost interest in it. During the period that the council was in existence, following its formation by the Respondent, the Respondent controlled significant aspects of its operation. Arguably it was because of this domination that employees decided that the council did not provide a meaningful vehicle for their input.

We decline, however, to rely on the judge's statement that the Respondent's initiation and support of the council "was designed to interfere with [the] employee[s'] free choice."

[20] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). While making this assumption, we nonetheless note that many of the events relied on by the judge to establish knowledge of Penn's union activity occurred after Penn's final written warning and are therefore entitled to little if any weight.

[21] In addition, the judge relied on the fact that Amy Bush, the executive director of surgical services, was "advocating that Penn be terminated" before the Respondent had adequately investigated Penn's conduct on November 28. While troubling, we note that rather than follow Bush's recommendation, human resources representative Kathy Grills instead thoroughly investigated the incident, including by obtaining statements from managers, as well as Penn, Hackett, Curtaccio, and the other techs on duty that night. It was only following that investigation that Penn received a written warning, which was consistent with the Respondent's progressive discipline policy.

[22] Merriam-Webster's Collegiate Dictionary (11th Ed. 2012) at 830.

to cover her overtime shift. The judge focused primarily on the language used by Penn in analyzing this factor. However, the credited testimony demonstrates that it was not just Penn's language that underlay this aspect of the warning, but more generally, Penn's demeanor during the conversation, including Penn's flatly informing Hackett that she did not intend to work on Christmas Day even though she was on the schedule.[23]

In sum, we find that the Respondent met its burden of demonstrating that it would have issued Penn a final written warning even if she had not been an open union supporter. Most critical, of course, is the evidence of job abandonment cited above: Penn left her shift in the anesthesia department even though there were four possible transplants that night and she was the designated person to cover any necessary overtime. Her conduct was all the more serious given the extremely small size of the department. Finally, we also rely, in dismissing this allegation, on the undisputed evidence that the Respondent followed its progressive discipline policy in issuing Penn a final written warning.

2. 8(a)(1) allegation

Penn's final written warning was rescinded six months later. At the time of the rescission, executive director of surgical services Amy Bush told Penn that the warning was being rescinded not because Penn was right in the matter, but because she had "bullied" other employees into writing statements on her behalf during the grievance process.[24] The judge found that Bush's statement violated Section 8(a)(1). We reverse and dismiss this allegation.[25]

The circumstances surrounding Bush's statement to Penn make clear that no reasonable employee would feel intimidated or coerced in the exercise of their Section 7 rights as a result of the statement. The record —— specifically, Curtaccio's credited testimony—establishes that Penn actually had bullied other employees into writing statements supportive of her position.[26] The judge gives no explanation as to why a reasonable employee in those circumstances would feel coerced by Bush's statement. Indeed, the judge merely repeats boilerplate language from Section 8(a)(1) of the Act.[27] As a result, we cannot find that the General Counsel met his burden of proof on this allegation.

AMENDED REMEDY

In addition to the remedies imposed by the judge, we shall require the Respondent to post the Notice to Employees for 120 consecutive days.[28] In ordering this remedy, we note that the purpose of Board remedial orders is to deter future violations and "reaffirm to employees their Section 7 rights and to reassure them that the Respondents will respect those rights in the future." *Pacific Beach Hotel*, 361 NLRB 709, 711 (2014) (and cited cases), enfd. in relevant part 823 F.3d 668 (D.C. Cir. 2016). In fulfilling this purpose, the Board exercises broad remedial authority to impose those remedies "required by the particular circumstances of a case." *Ishikawa Gasket America*, 337 NLRB 175, 176 (2001), enfd. 354 F.3d 534 (6th Cir. 2004). Here we find that an extended notice-posting period is warranted based on the number and serious nature of the Respondent's violations which permeated the Union's campaign to organize a unit of 3500 Shadyside employees. These wide-ranging violations include restrictions on employee support for the Union, the unlawful formation and domination of an employee organization, threats of discipline, and the unlawful discipline and discharge of multiple employees for union activities and because they had sought access to the Board. In addition, several of these violations oc-

[23] Hackett did not testify. However, Hackett spoke to executive director of surgical services Amy Bush later that day about Penn's conduct, and the judge credited Bush's recounting of what behavior Hackett objected to over that of Penn.

[24] In fact, the record shows that Penn's final written warning was rescinded because the Respondent was unable to locate a copy of the warning with all of the necessary signatures on it. Thus, Penn's alleged bullying actually was not the reason for the rescission. As our law requires, however, we decide this issue based on Bush's statement as made to Penn.

[25] Contrary to his colleagues, Member Pearce agrees with the judge's finding of a violation. As the judge found, Bush's statement was manifestly false; Penn's discipline was rescinded because the Respondent had misplaced the signed disciplinary forms. More importantly, the "process" to which Bush was referring was the Respondent's grievance process, which Penn had invoked in an effort to establish that she was improperly disciplined. And "bullying" referred to Bush's assertion that Penn's coworkers provided statements in support of her grievance because they were afraid of Penn. The judge rejected this assertion, finding "no credible evidence in the record to support such a statement." The judge further concluded that Bush's critical comments to Penn about the way she solicited employee support for her grievance would reasonably restrain Penn and other employees from exercising their protected rights to engage in concerted activity for the purpose of mutual aid and protection. Member Pearce agrees, and would adopt the judge's finding of a Sec. 8(a)(1) violation.

[26] Curtaccio, whom the judge found an "impressive" witness and specifically credited over Penn to the extent that their testimony differed, testified that her statement was written with Penn "standing right behind me" giving her directions as to the content of the statement. She complied with those directions because "Felicia was very intimidating."

[27] Similarly, we are not persuaded by Member Pearce's suggestion, see footnote 25 above, that such coercion would arise merely because Penn had been demanding statements in connection with her grievance process.

[28] The judge had denied this requested relief, citing the lack of specific case support. However, subsequent to the judge's decision, the Board has ordered extended notice periods in *Ozburn-Hessey Logistics, LLC,* 366 NLRB No. 177 (2018) (3 years), and *Pacific Beach Hotel*, cited in text below, 361 NLRB at 714 (3 years).

curred during the 60-day notice-posting period for allegations of prior Respondent unlawful conduct that had been informally settled.[29] This occurrence of violations during that posting period demonstrates the inadequacy of the standard notice-posting period as a deterrent of future unlawful conduct and an assurance to employees that their Section 7 rights would be protected. Accordingly, we find that a 120-day notice posting period is warranted here.[30]

ORDER

The Respondent, UPMC Presbyterian Shadyside Hospital, Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily prohibiting employees from wearing union insignia in patient care areas while permitting employees to wear insignia regarding other entities not related to the hospital in patient care areas.

(b) Prohibiting employees from wearing union insignia in nonpatient care areas.

(c) Discriminatorily prohibiting employees from posting union materials on its bulletin boards while allowing the ESS Employee Council to post materials on its bulletin boards.

(d) Coercively interrogating employees regarding their union activities.

(e) Threatening to discipline employees for refusing to participate in an unlawful interrogation.

(f) Impliedly threatening employees with a poor evaluation because of their union activities.

(g) Coercively requiring employees to write a statement regarding their union activities.

(h) Demanding employees' consent to be photographed and photographing employees engaged in union activity without proper justification.

(i) Forming, dominating, and rendering unlawful assistance to the ESS Employee Council, or any other labor organization.

(j) Issuing verbal or written discipline to its employees, suspending its employees, placing its employees on a Performance Improvement Plan (PIP), or discharging its employees for engaging in union activities.

(k) Issuing written discipline or discharging its employees because they were named in an NLRB charge or participated in a Board proceeding.

(l) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Ensure that the ESS Employee Council is completely disestablished, and refrain from recognizing the ESS Employee Council or any successor thereof, as representative of any of its employees for the purpose of dealing with the Respondent concerning terms and conditions of employment.

(b) Within 14 days from the date of this Order, offer Ronald Oakes, Albert Turner, and James Staus full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Ronald Oakes, Albert Turner, James Staus, and Leslie Poston whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Compensate Ronald Oakes, Albert Turner, James Staus, and Leslie Poston for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 6, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Ronald Oakes and Albert Turner and within 3 days thereafter notify these employees in writing that this has been done and that the discharges will not be used against them in any way.

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[29] As noted by the judge, the settlement approved by the Regional Director on Feb. 7, 2013, resolved charges in Cases 06–CA–081896, 06–CA–086542, 06–CA–090063, 06–CA–090133, 06–CA–090144, 06–CA–092507, 06–CA–092808, 06–CA–094095, and 06–CA–095735, and specified remedies including reinstatement and backpay for employees Frank Lavelle and Ronald Oakes, and notice posting for the standard 60 days.

[30] Member Emanuel dissents from the order of a 120-day posting period and notes that *Ozburn-Hessey Logistics* and *Pacific Beach Hotel*, cited by the majority, appear to be the only two cases in which the Board has ordered a posting period of longer than 60 days. Moreover, he notes that the employers' conduct in these cases was far more egregious than that involved in this case. See *Pacific Beach Hotel* (employers' had a "10-year history of . . . egregious and pervasive violations," had been the subject of two federal court injunctions under Sec. 10(j) of the Act, had been found in contempt of court for failing to comply with an injunction, and "*still have not complied* with the remedial obligations imposed on them during our earlier encounters." 361 NLRB No. 65, slip op. at 711 (emphasis in original)); *Ozburn-Hessey,* 366 NLRB No. 177, slip op. at 13 (employer had "extraordinary record of law-breaking;" Board's decision is sixth in series of decisions finding that employer had engaged in serious and widespread violations of the Act in the 9 years since union's organizing campaign began). Moreover, Member Emanuel agrees with Chairman Ring's dissent from the extended notice-posting period in *Ozburn-Hessey*.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful placement on a PIP and discharge of James Staus and within 3 days thereafter notify him in writing that this has been done and that his placement on a PIP and discharge will not be used against him in any way.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and written warning given to Leslie Poston and within 3 days thereafter notify her in writing that this has been done and that the suspension and written warning will not be used against her in any way.

(h) Within 14 days from the date of this Order, remove from its files any reference to the unlawful verbal and written warnings issued to Chaney Lewis, Albert Turner, and James Staus and within 3 days thereafter notify them in writing that this has been done and that the verbal and written warnings will not be used against them in any way.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its facilities in Pittsburgh, Pennsylvania, copies of the attached notice marked "Appendix."[31] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 120 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 21, 2013.

(k) Within 14 days after service of the notice by the Region, hold a meeting or meetings during working time, which shall be scheduled to ensure the widest possible attendance, at which the attached notice marked "Appendix" is to be read to the nonclinical support employees by shifts, departments, or otherwise, by a responsible management official in the presence of a Board agent and an agent of the Union if the Region or the Union so desires, or, at the Respondent's option, by a Board agent in the presence of a responsible management official, and if the Union so desires, an agent of the Union.

(l) Within 21 days after service by the Region, file with the Regional Director for Region 6 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with this Order.

IT IS FURTHER ORDERED that the allegations that the Respondent violated Section 8(a)(1) of the Act by denying nonemployee union organizers access to the hospital cafeteria, engaging in surveillance of employees who were talking to the union organizers in the cafeteria, and requiring employees who were in the cafeteria with the union organizers to produce their identification, are severed and retained for further consideration.

Dated, Washington, D.C. August 27, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER EMANUEL, dissenting in part.

I agree with my colleagues that the ESS Employee Council was a "labor organization" within the meaning of Section 2(5) of the Act, given the extremely broad language of that provision. However, I disagree with my colleagues and with the judge that the Respondent dominated or interfered with the formation or administration of the council. Therefore, I would reverse the judge and dismiss the Section 8(a)(2) allegation.

The established description of domination derives from *Electromation,* 309 NLRB 990 (1992), enfd. 35 F.3d 1148 (7th Cir. 1994), where the Board stated that "a labor organization that is the creation of management, whose structure and function are essentially determined

[31] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

by management, and whose continued existence depends on the fiat of management, is one whose formation or administration has been dominated under Section 8(a)(2)." Id. at 995; see also *EFCO Corp.,* 327 NLRB 372, 376-377 (1998), citing *Electromation,* supra (same), enfd. 215 F. 3d 1318 (4th Cir. 2000)*; Webcor Packaging, Inc. ,* 319 NLRB 1203, 1204 (1995), enfd. 118 F.3d 1115 (6th Cir. 1997), cert. denied 522 U.S. 1108 (1998) (same, also citing *Electromation*). Although the ESS Employee Council was created by management, it otherwise falls well short of the Board's description of domination or interference for a number of reasons. First, the Respondent did not determine the structure of the council; it simply posted a sign-up sheet and invited all employees to volunteer if they were interested in participating. Second, the Respondent did not control the function of the council; the employees themselves chose the topics of discussion for the meetings. Third, the council's continued existence was hardly controlled by "the fiat of management." To the contrary, the employees themselves had complete control over the continued existence of the council; when the employees gradually became disinterested in it, the council simply ceased to exist.[1] This factor was not considered by the judge.

I find the factors emphasized by the judge and my colleagues unpersuasive. First, although the employees were paid for their time and the council was provided an on-site meeting place, these factors do not automatically equal "contribution of financial or other support." See *Electromation,* 309 NLRB at 998 fn. 31. Second, although the employees formally adopted bylaws put forward by the Respondent that paralleled those used by a committee at its companion hospital, this "adoption" was purely perfunctory; the bylaws were never again mentioned and appeared to play no part whatsoever in the operation of the council.

The facts of this case are considerably weaker than those cases in which the Board has found unlawful domination or interference. Compare *EFCO Corp.,* 327 NLRB at 377 (in addition to employer creating committees and holding committee meetings on its premises during work time, employer also "essentially determined" the structure and function of the committees, selected the initial members, and chose the subjects they were to address); *Webcor,* 319 NLRB at 1204–1205 (employer determined number of employees to serve and deemed that they would be elected by other employees, determined council's function, and defined subject matter to be addressed; employer also ordered halt of council's functions and then subsequent reestablishment of council via second election); see also *E.I. du Pont & Co.*, 311 NLRB 893, 896 (1993) (extensive employer power over multiple committees). And finally, the judge's analysis of the domination/interference issue rests on an incorrect understanding of the law. He concludes his analysis by declaring that "[u]nder the circumstances present here, I find that the Respondent's initiation and support of the ESS Employee Council was designed to interfere with employee free choice in selecting a bargaining representative." As my colleagues implicitly acknowledge,[2] the Board has made clear that Section 8(a)(2) does not require a showing of antiunion animus or a specific motive to interfere with employees' Section 7 rights. See *Electromation,* 309 NLRB at 996 fn. 24; *Ryder Distribution Resources,* 311 NLRB 814, 818 (1993).[3] For all of these reasons, I would reverse the judge's finding of an 8(a)(2) violation.

Dated, Washington, D.C. August 27, 2018

William J. Emanuel, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discriminatorily prohibit employees from wearing union insignia in patient care areas while

[1] Although my colleagues find "little relevance" in this undisputed fact, their position is plainly contrary to the express language of *Electromation* and the cases following it. In addition, their speculation that employer "domination" somehow led the employees to "decide[] that the council did not provide a meaningful vehicle for their input" has no support in the judge's decision or in the record as a whole.

[2] See fn. 19.

[3] The judge's finding of a "design to interfere with employee free choice" also lacks support in the record.

permitting employees to wear insignia regarding other entities not related to the hospital in patient care areas.

WE WILL NOT prohibit employees from wearing union insignia in nonpatient care areas.

WE WILL NOT discriminatorily prohibit employees from posting union materials on our bulletin boards while allowing the ESS Employee Council to post materials on our bulletin boards.

WE WILL NOT coercively interrogate employees regarding their union activities.

WE WILL NOT threaten to discipline employees for refusing to participate in an unlawful interrogation.

WE WILL NOT impliedly threaten employees with a poor evaluation because of their union activities.

WE WILL NOT coercively require employees to write a statement regarding their union activities.

WE WILL NOT demand employees' consent to be photographed and photograph employees engaged in union activity without proper justification.

WE WILL NOT coercively inform an employee that the manner in which she solicited statements from employees during our internal grievance process was the reason a warning had been rescinded.

WE WILL NOT form, dominate, and render unlawful assistance to the ESS Employee Council, or any other labor organization.

WE WILL NOT issue verbal or written warnings to our employees, suspend our employees, place our employees on a Performance Improvement Plan (PIP), or discharge our employees for engaging in union activities.

WE WILL NOT issue written warnings or discharge our employees because they were named in an NLRB charge or participated in a Board proceeding.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL ensure that the ESS Employee Council is completely disestablished, and refrain from recognizing the ESS Employee Council or any successor thereof, as representative of any of our employees for the purpose of dealing with us concerning terms and conditions of employment.

WE WILL within 14 days from the date of this Order, offer Ronald Oakes, Albert Turner, and James Staus full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Ronald Oakes, Albert Turner, James Staus, and Leslie Poston whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as amended by the Board.

WE WILL compensate Ronald Oakes, Albert Turner, James Staus, and Leslie Poston for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 6, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Ronald Oakes and Albert Turner, and within 3 days thereafter notify these employees in writing that this has been done and that the discharge will not be used against them in any way.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful placement on a PIP and discharge of James Staus and within 3 days thereafter notify him in writing that this has been done and that his placement on a PIP and discharge will not be used against him in any way.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful suspension and written warning given to Leslie Poston and within 3 days thereafter notify her in writing that this has been done and that the suspension and written warning will not be used against her in any way.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful verbal and written warnings issued to Chaney Lewis, Albert Turner, and James Staus and within 3 days thereafter notify them in writing that this has been done and that the warnings will not be used against them in any way.

UPMC PRESBYTERIAN SHADYSIDE

The Board's decision can be found at www.nlrb.gov/case/06-CA-102465 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Suzanne Donsky, Julie Stern, and *David Shepley, Esqs.,* for the General Counsel.

Mark Stubley, Michael Mitchell, Ruthie Goodboe, Jennifer Betts, April Dugan, and *Thomas Smock, Esqs.,* for the Respondent.

Claudia Davidson and *Kathy Krieger, Esqs.,* for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Pittsburgh, Pennsylvania, on February 12–14, 20–21, 24–27, March 3–6, 31, April 4 and 8, 2014. SEIU Healthcare Pennsylvania CTW, CLC (the Union) filed the charge in 6–CA–102465 on April 10, 2013.[1] Thereafter, the Union filed additional charges in 06–CA–102494, 06–CA–102516, 06–CA–102518, 06–CA–102525, 06–CA–102534, 06–CA–102540, 06–CA–102542, 06–CA102544, 06–CA–102555, 06–CA–102559, 06–CA–102566, 06–CA–104090, 06–CA–104104, 06–CA–106636, 06–CA–107127,06–CA–107431, 06–CA–107532, 06–CA–107896, 06–CA–108547, 06–CA–111578, and 06–CA–115826. On September 30, 2013, the General Counsel issued an order consolidating cases, consolidated complaint, and notice of hearing. On November 5, 2013, the General Counsel issued an order further consolidating cases and an amendment to the consolidated complaint. On January 9, 2014, the General Counsel issued a second order further consolidating cases and amended consolidated complaint (the complaint). In the complaint the General Counsel alleges that Respondent UPMC and Respondent UPMC Presbyterian Shadyside (Respondent Presbyterian) constitute a single employer. After the issuance of the complaint, Respondent UPMC and Respondent Presbyterian (the Respondents) filed with the Board a motion to dismiss the allegation that Respondent UPMC and Respondent Presbyterian constitute a single employer. On February 7, 2014, the Board issued an order denying the Respondents' motion.

As noted above, the trial in the instant matter opened on February 12, 2014. The parties agreed, with my approval, to first litigate the substantive unfair labor practice allegations in the complaint against Respondent Presbyterian and then litigate the issue of whether Respondent UPMC and Respondent Presbyterian constituted a single employer within the meaning of the Act. Thus, the trial commenced with the litigation of the substantive unfair labor practice allegations. Although the General Counsel and the Union had issued subpoenas duces tecum to both Respondent UPMC and Respondent Presbyterian Shadyside that related solely to the single-employer issue prior to the commencement of the hearing, rulings on the petitions to revoke that had been filed to each of those subpoenas was initially deferred. As the trial regarding the unfair labor practice allegations progressed, it became necessary to address the issues raised by the petitions to revoke those subpoenas so that the parties could prepare to litigate the single employer phase of the proceeding. On February 24, 2014, on the record, I denied, in substantial part, petitions to revoke the subpoenas duces tecum that the General Counsel had served on Respondent UPMC and Respondent Presbyterian Shadyside, respectively, and a subpoena duces tecum that the Union had served on Respondent UPMC. Consequently, I ordered both the Respondents to produce documents pursuant to the subpoenas. Thereafter, the Respondents indicated they would not comply with my order and thus on March 20, 2014, on behalf of the Board, the General Counsel filed an application to enforce all three subpoenas in the United States District Court for the Western District of Pennsylvania.

On April 3, 2014, I issued an order, on the record, severing the single-employer allegations from the unfair labor practice allegations in the complaint. I determined it was appropriate to first issue a decision regarding the alleged unfair labor practices committed by Respondent Presbyterian and later issue a supplemental decision regarding the issue of whether Respondent UPMC and Respondent Presbyterian Shadyside constitute a single employer.[2] My reason for doing so was that, in light of the ongoing subpoena enforcement proceedings in the district court, there was substantial uncertainty as to when the single-employer allegations in the complaint would proceed to trial.[3] I do not believe that it would aid in the efficient administration of the Act to delay the disposition of the substantive allegations of the complaint while awaiting the outcome of the protracted subpoena enforcement litigation involving the single-employer issue. Consequently, this decision involves only the allegations of the complaint that Respondent Presbyterian committed the unfair labor practices alleged in the complaint. Accordingly, the term Respondent as it is used in this decision refers only to Respondent Presbyterian.

Posthearing Motions

After receiving a series of extensions, the parties filed their briefs in this matter on July 18, 2014. On the same date, the General Counsel and the Respondent filed motions to correct the transcript. On August 6, 2014, the Union filed an opposition to the Respondent's motion to correct the transcript. The record in this case is lengthy (over 3100 pages) and both motions point out a number of errors contained in the transcript and set forth the appropriate corrections. I grant both motions. Because of the number of corrections, I will not list them in this decision but rather order that both motions are hereby included in the record and that the transcript is corrected in the manner set forth in the motions.

On July 23, 2014, the General Counsel filed a motion to withdraw paragraph 8 and paragraphs 34(a), (b), and (c) of the complaint. I grant the General Counsel's motion since the record does not contain evidence to support those complaint allegations.

On July 28, 2014, the General Counsel filed a motion to

[1] All dates are 2013 unless otherwise indicated.

[2] There are no allegations in the complaint that Respondent UPMC itself committed any unfair labor practices. Respondent UPMC would only have liability for any unfair labor practices if it is found to be a single employer with Respondent Presbyterian.

[3] On August 22, 2014, the district court issued an order granting the Board's application for enforcement of the three subpoenas, which it amended on September 2, 2014. The district court stayed its order pending an appeal by the Respondents.

strike articles contained in appendix 8 of the Respondent's posthearing brief regarding "Factors Affecting Medication Errors Among Staff Nurses: Basis in the Formulation of Medication Information Guide" and references to that article contained in footnote 148. The General Counsel also moved to strike the reference to information on a website regarding "ODC Guidelines for Disinfection and Sterilization in Healthcare Facilities" contained on page 78 of the Respondent's brief. On August 11, 2014, the Respondent filed an opposition to the General Counsel's motion. The basis for the General Counsel's motion is that neither of these documents was introduced into evidence at the hearing. I grant the General Counsel's motion regarding these two issues. Since these documents were not introduced as evidence at the hearing they cannot be introduced into the record at this point. *International Bridge & Iron Co.,* 357 NLRB 320, 321 (2011); *King Soopers, Inc*., 344 NLRB 842 fn. 1 (2005), enfd. 476 F. 3d 843 (10th Cir. 2007); Section 102.45 (b) of the Boards Rules and Regulations.

The General Counsel's motion to strike also requests that I strike certain references in the Respondent's brief on the basis that those references are not supported by record evidence. I deny this aspect of the General Counsel's motion to strike as it is in the nature of an answering brief. There is no provision in Section 102.42 of Board's Rules and Regulations for the filing of an answering brief with an Administrative Law Judge. Moreover, I am perfectly capable of evaluating the record support for assertions made in a brief.

Finally, all of the parties filed a statement of position regarding the effect of the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), on certain cases referred to the posthearing briefs

On the entire record, including my observation of the demeanor of the witnesses,[4] and after considering the briefs filed by the General Counsel, the Union, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Presbyterian, a Pennsylvania nonprofit corporation, with offices and places of business in Pittsburgh, Pennsylvania, has been engaged in the operation of acute care hospitals providing inpatient and outpatient medical care. Annually Respondent Presbyterian, in conducting its operations described above, derives gross revenues in excess of $250,000 and purchases and receives at its Pittsburgh, Pennsylvania facilities goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. Respondent Presbyterian admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is a health care institution within the meaning of Section 2(14) of the Act. I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The substantive allegations of the complaint, as amended, allege that, commencing in February 2013, the Respondent engaged in numerous violations of Section 8(a)(1) of the Act including, creating the impression of surveillance of employees union activities, engaging in surveillance of union activities, threatening employees with discipline, threatening to arrest employees, interrogating employees, impliedly threatening an employee with a poor evaluation, photographing an employee engaged in union activity, and disparately enforcing its solicitation policy in several instances.

The complaint further alleges that since February 20, 2013, the Respondent violated Section 8(a)(2) and (1) of the Act by dominating and giving support to the Presbyterian Hospital Environmental Support Services Employee Council (the ESS employee council), a labor organization it established and by dealing with the ESS employee council concerning terms and conditions of employment.

The complaint also alleges that on March 20, 2013, the Respondent discharged Ronald Oakes and on March 28, 2013, issued a final written warning to Chaney Lewis in violation of Section 8 (a)(4), (3), and (1) of the Act.

Finally, the complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by: on December 20, 2012, issuing a final written warning to Felicia Penn; on February 27, 2013, issuing a written warning to David Jones; on February 28, 2013 suspending Leslie Poston; on March 11, 2013, issuing a final written warning to Poston; on March 9 discharging Finley Littlejohn; on April 4, 2013, issuing a verbal warning to James Staus; on April 23, 2013, issuing a final written warning to Albert Turner; on April 26, 2013 issuing a verbal warning to Staus; on May 14, 2013 placing Staus on a Performance Improvement Plan; on June 18, 2013, discharging Albert Turner; and on July 1, 2013, discharging Staus.

Background

The Respondent, which is located in Pittsburgh, Pennsylvania, is composed of Presbyterian Hospital[5] and Shadyside Hospital, which are located adjacent to each other. Presbyterian and Shadyside are operated as one hospital and have one taxpayer identification number. The Western Psychiatric Institute and Clinic (WPIC) is also administratively part of the Respondent and is located near Presbyterian and Shadyside. At Presbyterian Hospital there are approximately 6000 employees, including

[4] In making my findings regarding the credibility of witnesses, I have considered their demeanor, the content of the testimony and the inherent probabilities based on the record as a whole. In certain instances, I credited some, but not all, of what the witness said. I note, in this regard, that "nothing is more common in all kinds of judicial decisions than to believe some and not all" of the testimony of a witness. *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). See also *J. Shaw Associates*, LLC, 349 NLRB 939, 939–940 (2007). In addition, I have carefully considered all the testimony in contradiction to my factual findings but have discredited such testimony.

[5] Presbyterian Hospital also includes "Montefiore Hospital" which is also located adjacent to Presbyterian and had been acquired by Presbyterian and merged into its operations. Although Montefiore no longer exists as a separate hospital, witnesses used that name to describe the building where Montefiore was formerly located.

approximately 2100 nonclinical support employees, employed in approximately 200 departments. At Shadyside Hospital there are approximately 3000 employees, including 1400 nonclinical support employees, employed in 100 departments. Many departments operate at both hospitals.

Dr. Margaret Reidy, the Respondent's senior vice president for medical affairs, testified that there are some nurses and support employees that are represented by a union at WPIC and that some maintenance employees and security officers are represented at Presbyterian. While Dr. Reidy testified that these employees have been represented for a period of time, she was uncertain as to whether the employees were organized at the time that the Respondent took over those facilities. Gerald Moran, the Respondent's security operations manager, testified that there are 26 security officers at Presbyterian Hospital and that they have been represented from approximately the mid to late 1990's. There is no evidence in the record regarding a description of these bargaining units or the name of the collective-bargaining representative for each unit.

In the spring of 2012, the Union began a campaign to organize the nonclinical support employees employed at the Respondent. Union representative Sarah Fishbein testified that she was hired by the Union in June 2012 and was assigned to the ongoing campaign to organize the Respondent's support employees. As part of the campaign the Union distributed union buttons, lanyards and flyers to employees. The committee of the employees supporting the Union included Leslie Poston, Chaney Lewis, Larry Ward, Frank Lavelle, Albert Turner, Bonita McWhrrter, James Staus, and Finley Littlejohn. The Union's campaign was continuing at the time of the hearing. The Union has not filed a petition for an election.

The Respondent has openly indicated that it is opposed to the Union's attempt to organize its nonclinical support employees. In this regard, the Respondent posted a document on its website entitled "UPMC Cares" (CP Exh. 6), which contains information about the SEIU and unions in general. It also contains a section entitled "Why Unions Aren't Necessary" which indicates, inter alia:

> We respect our associates-lawful right to choose or reject union representation. However, we believe that our associates don't need a union to represent them.
> We believe that unionization is Not in the best interest of our associates. (Emphasis in the original.)
>
> The presence of the union could change relationships between managers, supervisors and associate her testimony thats. A contract could force associates to go through a union steward instead of talking directly with management. (CP Exh. 6 pp. 3-4.)

The copy of the material contained on "UPMC Cares" introduced into evidence is dated February 14, 2013. The record establishes, however, that this website was operating since at least the fall of 2012. In addition, since at least the fall of 2012, the Respondent has utilized screen savers on employees' computers throughout the hospital which scroll messages regarding the Union. One such message indicated "You can say NO to the SEIU. It's your right." (Emphasis in the original.) The screensavers direct employees to the UPMC Cares website for more information. (CP Exh. 5)

The Prior Settlement Agreements

Pursuant to unfair labor practice charges filed by the Union, on February 7, 2013, the Regional Director for Region 6 approved an informal settlement agreement in a case captioned "UPMC and its subsidiaries UPMC Presbyterian Shadyside and Magee-Women's Hospital of UPMC, Single Employer, d/b/a Shadyside Hospital and/or Presbyterian Hospital and/or Montefiore Hospital and/or Magee-Women's Hospital," Cases 06–CA–081896, 06–CA–086542, 06–CA–090063, 06–CA–090133, 06–CA–090144, 06–CA–092507, 06–CA–092828, 06–CA–094095, and 06–CA–095735. (ALJ Exh. 1.) This settlement agreement was executed by UPMC Presbyterian Shadyside and provided for, inter alia, the payment of back pay and offers of reinstatement to employees Frank Lavelle and Ronald Oakes. The settlement agreement contains a nonadmission clause.

The settlement agreement also indicates that the notice would be posted in UPMC Presbyterian Hospital, UPMC Shadyside Hospital, and Montefiore Hospital. The settlement agreement indicates that it did not settle certain allegations of the amended consolidated complaint in Case 06–CA–081896 with respect to the solicitation, electronic mail and messaging, and acceptable use of information technology resources policies. It further provided that: " The reference in the caption of this case to the Single Employer is not intended to be, and will not be proffered as, evidence that a Single Employer relationship exists, during this or any other proceeding or case, including any default proceeding."

The settlement agreement also contains the following "default" language:

> The Charged Party agrees that in case of noncompliance system-wide as to the policies alleged in the amended consolidated complaint and all other allegations in the amended consolidated complaint occurring at UPMC Presbyterian Shadyside with any of the terms of this Settlement Agreement by the Charged Party within 180 days of the closing of this case, and after 14 days notice from the Regional Director of the National Labor Relations Board of such noncompliance without remedy by the Charged Party, the Regional Director will reissue the portion of the complaint previously issued on December 13, 2012, and amended on January 8, 2013, in the instant case, which relates to that part of this Agreement with which the Charge Party is not in compliance. Thereafter, the General Counsel may file a motion for default judgment with the Board on the allegations contained in the pertinent portion of the complaint, excluding all single employer allegations. The Charged Party understands and agrees that such allegations of the aforementioned complaint will be deemed admitted and its Answer to such portion of the complaint will be considered withdrawn. The only issue that may be raised before the Board is whether the Charge Party defaulted on some terms of this Settlement Agreement. The Board may then, without necessity of trial or any other proceeding, find such allegations of the complaint to be true and make findings of fact

and conclusions of law consistent with those allegations adverse to the Charged Party on the issues raised in the General Counsel's motion for default. The Board may then issue an order providing a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board order ex parte, after service or attempted service upon Charge Party/Respondent at the last address provided to the General Counsel.

On February 7, 2013, the Regional Director for Region 6 also approved an informal settlement agreement with the same case caption noted above in Case 06–CA–081896. (ALJ Exh. 2.) The settlement agreement was executed by Magee-Women's Hospital of UPMC and provided for a notice posting at that hospital reflecting that it would not maintain certain policies and that it would not discriminatorily enforce other policies. The settlement also includes a non-admission clause. This settlement agreement contained the same scope of the agreement language indicating that this agreement did not settle certain allegations in the amended consolidated complaint in Case 06–CA–081896 regarding the solicitation, electronic mail and messaging, an acceptable use of information technology resources policy. The settlement agreement also contained the same language quoted above regarding the reference to the single employer in the case caption. It also includes the same "default" language except that it makes specific reference to "Magee-Women's Hospital of UPMC" in the first sentence rather than referring to "UPMC Presbyterian Shadyside."

The Regional Director issued an order severing the remaining allegations of Case 06–CA–081896 from the settled cases issued on February 8, 2013, and a second amended complaint issued on February 11, 2013.

Thereafter, a trial was held with respect to the remaining allegations Case 06-CA-081896 on February 20, 2013, before Administrative Law Judge David Goldman. The issues in that case were whether Respondent Presbyterian and Respondent Magee maintained an unlawful solicitation policy effective from December 15, 2011, until October 9, 2012; and an "electronic mail and messaging policy" and an " acceptable use of information technology resources policy" that were overly broad and violative of Section 8(a)(1) of the Act.

On April 19, 2013, Judge Goldman issued a decision (JD–28–13) finding that the solicitation policy was facially lawful and therefore he dismissed that allegation in the complaint. He also found, however, that the electronic mail and messaging policy and the acceptable use of the information technology resources policy were overly broad and violated Section 8(a)(1) of the Act. Judge Goldman construed the amended complaint that issued on February 11, 2013, as not naming UPMC as a Respondent (JD–28–13, slip op. at 21).

As part of the record in that proceeding, however, Respondent Presbyterian Shadyside, Respondent Magee-Women's Hospital, and UPMC entered into the following stipulation:

> The undersigned parties hereby stipulate that any policies either adjudicated as unlawful, or which Respondent agrees to voluntarily rescind in connection with the instant matter, will be expunged wherever they exist on a systemwide basis at any and all of Respondent's facilities within the United States and its territories, including, but not limited to, those which are operated by UPMC Presbyterian Shadyside and Magee-Womens Hospital of UPMC.
>
> Moreover, Respondent agrees that it will notify all of its employees at all of Respondent's facilities within the United States and its territories where such policies were in existence, including but not limited to, those employees working in facilities which are operated by UPMC Presbyterian Shadyside and Magee-Womens Hospital of UPMC, that such policies have been rescinded and will no longer be enforced. Appropriate notice to employees of the rescission will be accomplished by whatever means Respondent has traditionally used to announce similar policy changes to employees and other circumstances.
>
> Presbyterian Shadyside, Magee and UPMC shall comply with the terms of the stipulation. (JD-28-13, slip op. at 23)

The Respondents and the Charging Party filed exceptions to Judge Goldman's decision and that case is presently pending before the Board.

At the hearing in the instant case, counsel for the General Counsel claimed that the Respondent has committed sufficient unfair labor practices since the execution of the above noted settlement agreement (ALJ Exh. 1) so as to constitute a default under the terms of the settlement agreement. Counsel for the General Counsel further indicated that if I find that the Respondent committed unfair labor practices in the instant proceeding, the General Counsel will file a motion for default judgment, pursuant to the terms of that settlement agreement, directly with the Board after I issue a decision.

The instant decision involves only the allegations of the complaint before me and my findings and conclusions are based on the evidence contained in this record. I have made no findings, drawn any inferences, or made any conclusions based upon the settlement agreements noted above in the prior cases. The issue of whether the Respondent has defaulted on any terms of the settlement agreement between it the General Counsel and the Union is for the Board to decide, if and when the General Counsel files a motion for default judgment.

The Reinstatement of Employees Pursuant to the Settlement Agreement Between the Parties

Pursuant to the settlement agreement between the General Counsel, the Respondent, and the Union in Case 06–CA–081896 at al., Employees Ronald Oakes and Frank Lavelle were reinstated on February 25, 2013. On the same date, the Union held a rally across the street from the emergency room entrance to UPMC Presbyterian Hospital to celebrate their reinstatement. After Oakes shift ended on February 25 at approximately 3 p.m., Oakes walked out of the hospital and crossed the street to attend the rally. As Oakes left the hospital he was accompanied by employees Chaney Lewis and Finley Littlejohn. Several of the Respondent's security guards, including Donald Charley, the vice president for parking and security for UPMC Presbyterian Hospital and UPMC Magee Hospital, were stand-

ing outside where the three employees exited Presbyterian Hospital and watched them as they crossed the street to the rally where approximately 200 employees had gathered. At the rally Oakes thanked everyone for their support for him.

The Spring 2012 Conversation between Bart Wyss and Albert Turner

As noted above, the General Counsel, with my approval, has withdrawn Paragraph 8 of the complaint which alleged that on about November 19, 2012, the Respondent, by Bart Wyss, violated Section 8(a)(1) of the Act by telling employees it knew what they were discussing, created an impression of surveillance of employees' union activities.

Although I will not consider the evidence adduced at the hearing regarding this matter as an unfair labor practice, I consider it to be relevant background information.

Albert Turner testified on behalf of the General Counsel regarding this issue. Turner was employed as a shuttle bus driver by the Respondent from the time that the Respondent acquired the shuttle bus operation from Transportation Solutions, Inc. in November 2010 until he was discharged in June 2013. Turner had worked as a shuttle bus driver at the Respondent's facilities for Transportation Solutions since 2007.

Turner credibly testified that he began to support the Union in the spring of 2012. In this connection, he solicited other employees to sign authorization cards. He also placed union literature on bulletin boards in the trailer that housed the Kronos time clock that shuttle bus drivers used to swipe in and out of work.

According to Turner, in the spring of 2012, one of the dispatchers, Nancy MacCracken, called him and told him that before he started his route to come down to the office and meet with Bart Wyss, who was then the Respondent's operations manager for employee transit.

Turner testified that when he arrived at Wyss's office, Wyss asked him if he knew about the Respondent's solicitation policy. Turner replied no and Wyss said he was going to read it to him and then read the Respondent's solicitation policy to Turner. After reading the policy, Wyss told Turner that he was not allowed to solicit on any UPMC property, even on Forbes Avenue, and that he was not allowed to go to any of the homes of his coworkers. Turner testified that the Respondent has a few office buildings on Forbes Avenue.[6]

Turner replied by telling Wyss that he "can tell me what to do here but you can't tell me what to do on my own time." Turner also asked Wyss why he was reading him the solicitation policy and Wyss replied that he had a good source that told him Turner was soliciting. When Turner asked him who the source was, Wyss replied it not matter who it was, but it was a good source.

Wyss testified that in June 2012 employees reported to him that Turner was soliciting them regarding the Union. These employees further indicated that while they had asked Turner to stop speaking to them about the Union, he persisted in doing so. Wyss contacted the Respondent's human resources department and reported what the employees had informed him regarding Turner's solicitation of employees on behalf of the Union. According to Wyss, either Shannon Corcoran or Jennifer Delsandro in the human resources department instructed him to read the solicitation policy to Turner to make him aware of it. Wyss testified that he requested Supervisor Ted Hill have Turner report to his office. According to Wyss, when Turner arrived he read him the solicitation policy to him and told him he was free to go. Wyss testified that he did not recall what Turner said to him on this occasion.

I credit Turner's testimony regarding his conversation. Turner's testimony was more detailed and his demeanor reflected certainty with respect to what was said to him. While Wyss admitted reading the solicitation policy, his testimony contained no further details regarding what he said. Wyss admitted that he did not recall what Turner said to him during this meeting. I find Wyss's testimony that he called Turner into his office, read him the solicitation policy, and then told him he was free to go, without saying anything more, to be implausible.

Based on Turner's credited testimony, I find that sometime in the spring of 2012, Wyss called Turner to his office and read him the then current version of the Respondent's solicitation policy. Wyss added his reason for doing so was that good sources had reported to him that Turner was soliciting on behalf of the Union. In addition, Wyss told Turner that he could not solicit for the Union on the Respondent's property and, in addition, he was not permitted to solicit employees at their homes. Since the first unfair labor practice charge underlying this complaint, 06–CA–012465, was filed on April 10, 2013, this incident occurred far outside of the 10(b) period and cannot serve as a basis for an unfair labor practice finding. However, this incident is certainly relevant as background to the allegations in the complaint. In the first instance, it establishes that the Respondent knew that Turner was a supporter of the Union as early as the spring of 2012 and also conveyed the impression that his union activities were under surveillance. In addition, when Wyss told Turner that he could not solicit for the Union anywhere on the Respondent's property and could not solicit employees at their home, he was placing unlawful restrictions on his right to solicit for the Union. It has been clear since *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), that it is unlawful for an employer to maintain a general rule prohibiting solicitation at any time on its premises. With regard to Wyss' instructions to Turner to not engage in home visits, an employer has no right to interfere with the union activities of an employee that occur while the employee is not working and not on the employer's property.

The Cafeteria Incident

Facts

Paragraphs 11 through 14 complaint allege that on February 21, 2013, the Respondent, by Gerald Moran: in the presence of employees, threatened to arrest nonemployees as they were engaged in lawful union activities with its employees; in the

[6] On cross-examination Turner testified that he spoke to Wyss about the solicitation policy in February 2013. Considering the record as a whole, I find that Turner's conversation with Wyss about the solicitation policy took place in the spring of 2012, as Turner testified on direct examination or, at the latest, in June 2012, which is when Wyss recalled the conversation occurring.

presence of its employees threatened to arrest its employees as they were engaged in lawful union activity; engaged in surveillance of its employees as they were engaged in lawful union activities; and coerced and intimidated its employees by requesting that they show their identification badges to Respondent as they were engaged in lawful union activities. The complaint alleges that this conduct violates Section 8(a)(1) of the Act.

According to the mutually corroborative testimony of union representatives Fishbein and Amber Stenman, at approximately 11a.m. on February 21, 2013, they entered the Respondent's cafeteria, which is located on the 11th floor of Presbyterian Hospital, and met with a group of employees that included Leslie Poston, Chaney Lewis, Albert Turner, Mazell Holiday, Larry Ward, and Rob Marshall. Poston, Holliday, and Marshall were not on duty on that date. The union representatives were seated with the employees at two tables. Some other employees stopped at the tables during the time the union representatives were there.[7] The union representatives discussed union matters, including the recent NLRB settlement, with the employees who were present. There were union flyers and pins at the table that the union representatives and employees were sitting at. Some of the employees seated at the table, including Albert Turner, passed out some of the flyers. (Tr. 112, 145.) The union representatives did not distribute any of the flyers and did not leave the tables that they were sitting at during the entire period they were in the cafeteria. Many of the customers of the cafeteria at the time were employees wearing hospital uniforms.

There is nothing posted in the cafeteria placing any limitations on who may patronize it. The Respondent's solicitation policy in effect on that date states: "Non-staff members may not solicit, distribute or post material at any time on UPMC premises." (GC Exh. 162.)

At approximately 12:40 p.m., Gerald Moran, the Respondent's security operations manager, approached the group and asked Fishbein what they were doing there. Moran also asked Fishbein for her identification. Moran was not in a uniform but rather was wearing a shirt and tie. Fishbein replied that they were having lunch and talking about the Union. Fishbein then asked Moran who he was and Moran replied that he was a police officer. Fishbein asked to see his badge, which Moran showed her.[8] Moran asked if Fishbein was an employee and Fishbein replied, "no." Fishbein asked why he was "harassing" them and Moran replied that he was investigating a complaint about unauthorized persons in the cafeteria. Fishbein asked Moran if he had heard about the settlement that had just occurred that brought two employees back to work and also indicated that employees had the right to talk about the Union in nonpatient areas. Moran said he had heard about the settlement and talked to legal counsel about it and then he again asked Fishbein for identification. Fishbein then showed Moran her identification and Moran wrote down some of the information contained on it.

Moran then asked the other individual seated at the table whether they were UPMC employees and Stenman replied that she was not. Moran then asked her for identification. Stenman replied that she did not have her ID; all that she had was her debit card that she brought to buy her lunch that day. Moran asked Stenman to see it and she told him she did not feel comfortable doing that. Stenman told Moran her name and he wrote it down.

Moran then went to each person at the table with Fishbein and Stenman and asked them for their identification.[9] When Fishbein asked him if he asked everyone in the cafeteria for identification, Moran replied only when he received a complaint. Moran asked employee Mozelle Holiday if she was an employee and she replied that she was. Several of the employees said that they had a right to be there and talk about the Union in the cafeteria. Holiday stated that "this is ridiculous" and that they were allowed to be there. Moran told Holliday that she was getting loud and that if she did not quiet down, she would have to leave. When Moran asked Rob Marshall whether he was an employee, Marshall replied that he was, but he refused to show his identification. Marshall and Lewis asked Moran about the nature of the complaint that he had received and Moran replied the complaint was that there were people in the cafeteria who were not authorized to be there. Moran said that the only people authorized to be in the cafeteria were patients, their families, visitors of patients, and employees.

According to Stenman, there was a woman sitting near the employees and union representatives who they had spoken to earlier about the union but that she had replied that she did not work there and was waiting for her friend who worked there to have lunch. Stenman told Moran that the individual they had spoken to was not an employee, a patient or family member and asked whether she would also have to leave. Moran responded, "Maybe but I'm dealing with this right now."

Marshall and Lewis then asked Moran to turn his ID badge around and Lewis began to videotape Moran. Moran spoke to Lewis by name and told him that there was no videotaping allowed in the hospital. When Lewis asked Moran how he knew his name because he never seen Moran before, Moran replied, "You're Chaney Lewis. You go around the hospital destroying property and posting flyers."

Moran then stated that individuals who were not employed at the hospital would have to leave after they finished lunch.[10] Af-

[7] The testimony of Fishbein and Stenman is corroborated by the contemporaneous notes Steadman made about the incident in the cafeteria on February 21, 2013. (R. Exh. 196.) Their testimony is also generally corroborated by the testimony of Poston.

[8] Moran received a commission as a police officer from the Allegheny County Court in October 2008.

[9] A brief recording from Lewis' cell phone that was introduced into evidence by the Respondent confirms that Moran questioned employees about whether they had identification. (R. Exh. 155)

[10] I base this finding on the credited testimony of Stenman on cross-examination. Her testimony on this point (Tr. 149) is supported by her contemporaneous notes of this incident (R. Exh. 196) which reflect that after Moran identified Fishbein and Stenman as Union representatives he stated "We are not allowed to be here having lunch with workers." I therefore find Stenman's cross-examination testimony on this point more reliable than her vague testimony on redirect examination by the Union that when Moran approached the table he did not tell employees they could stay (Tr. 217). I also note that Stenman credibly testified that Moran asked an individual named Terry Brown, who was seated at a

ter Fishbein stated that they were having lunch and were not leaving, Moran went over to a phone on the wall and made a phone call. He was later observed making a phone call on his cell phone by the union representatives and employees seated at the table.

At approximately 1:25 p..m. Moran again approached the table that the union representatives and employees were sitting at. He was accompanied by approximately four uniformed Pittsburgh police officers and two uniformed University of Pittsburgh police officers. A Pittsburgh police officer identified himself as Anthony Yauch and said that he received a 911 call from the hospital regarding unauthorized people being in the cafeteria. According to Fishbein, she told Yauch that there had been a "settlement" and that the employees were there eating lunch and talking about the Union. Yauch replied that was a civil case and he was investigating a criminal complaint and that "we would have to leave the hospital property." (Tr. 59.) According to Stenman, Yauck stated, "I'm going to have to ask you to leave." (Tr. 125.) At that point the union representatives and the remaining employees got up from the table and proceeded to walk out of the cafeteria to the elevator. The group of police officers walked behind the union representatives and employees as they exited the cafeteria.

Moran testified that on February 21, 2013, he received a phone call from Christine Kieffer Wolff, one of the Respondent's managers, who reported to him that there were nonemployees in the cafeteria soliciting for the Union and handing out flyers. Wolff also said that they were taking up a number of tables in the seating area of the cafeteria. Shortly thereafter, Moran received a call from an employee who reported that as he was exiting the cafeteria and an individual put a union flyer, "in his face" and that he was upset over this incident.

After receiving these reports, Moran spoke to his superior Donald Charley, the vice president for parking and security for Presbyterian Hospital and UPMC Magee Hospital, about this matter. Charley directed Moran to contact one of the Respondent's in-house counsel to discuss the matter. After speaking to counsel, Moran went to the cafeteria to investigate the complaints that he had received. When Moran arrived at the cafeteria, he first went to the tray line area and did not observe anyone handing out flyers. He then walked in the cafeteria seating area and observed two or three tables pushed together and individuals standing around the tables. He also observed a number of flyers on the table that were printed on yellow paper. From past experience Moran recognized these as union flyers. In this connection, Moran testified that every Thursday for a few months he had observed a group of "people" with tables together with flyers on the table. Moran then testified somewhat vaguely "they were handing things out. Most times that I observed it, most of the time it was just employees doing it." (Tr. 2817.) Although Moran's testimony is somewhat indistinct, I find that that he observed only employees handing out flyers in the cafeteria in these previous incidents. Given his reaction to the incident that occurred on February 21, if there were individuals suspected to be union representatives distributing material in previous Thursday meetings in the cafeteria, I am certain that he would have further investigated the matter.

After observing the situation, Moran went to a phone located on a support column in the cafeteria and reported his observations to Charley. Charley asked him if he recognized everybody seated in the group, and Moran responded that there were two women seated at the table that he did not recognize. He also reported that other individuals seated there seemed familiar and some were wearing ID badges and others were not. Charley again instructed Moran to contact the Respondent's in-house counsel. According to Moran, while he was on the phone, Lewis came up to within a foot of him. Moran told Lewis he was on the phone and that if Lewis needed to use the phone there was another one located across the hall in the cafeteria. Lewis, however, remained close by Moran during his phone conversation.

Moran testified that after finishing his phone call, he approached an individual who he later learned was Fishbein and told her that he was with security at the hospital and that he was a police officer. Moran held up his identification to Fishbein so that she could see it. Moran testified that he then asked Fishbein what her business was at the hospital and whether she was there for a medical purposes or visiting a patient. Fishbein replied no and said that she was there having lunch with her union friends.

Moran asked Fishbein for her identification and she initially refused to provide it. Moran then told Fishbein that if she did not provide her information she could suffer the consequences. (Tr. 2859.) At that point Fishbein provided identification. Moran testified that he then told Fishbein that she was going to have "to pack up and leave" (Tr. 2823). When Fishbein replied that she was having her lunch, Moran told her that she could have a couple of minutes while he obtained "this other person's identification but you going to have to pack up and leave."

Moran then proceeded to ask Stenman the same questions he had asked Fishbein. Stenman also replied that she was having lunch with her union friends. When Moran asked Stenman for identification she replied that she had no identification with her except her credit card. When Moran asked to see the credit card because he wanted to obtain her name, Stenman replied that she would not show it to him because she was afraid he would steal her information from it. Moran then told Stenman that she was going to also have to leave.

At that point there were approximately four other females seated at the table and some of them looked familiar to Moran. He asked them for identification and they replied that they were not showing him anything.

Moran testified that he then updated Charley and in-house counsel and then contacted 911. While he was making these phone calls Moran testified that Lewis would come up to within 12 inches of him and that he ended up using his cell phone to make the calls.

According to Moran, the first police officer that arrived was a plainclothes Pittsburgh police officer, Detective Pasquarelli.

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table with the Union representatives, whether she was an employee and Brown replied that she was not. Moran told Brown that she would have to leave the cafeteria when she finished with her lunch. (Tr. 121-122.) The status of Brown is not further identified in the record. Poston testified in a generalized manner that Moran "Asked us to leave." (Tr. 251.) I find Stenman's account to be the most reliable version of what Moran said regarding who had to leave the cafeteria.

When Pasquarelli approached Moran, who was standing in the middle of the cafeteria, Lewis came up and stood between them. When Pasquarelli asked Lewis if there was a problem Lewis replied, "this guy surveilling me." When Pasquarelli asked if there was anything else, Lewis replied, "he's violating my rights." Pasquarelli told Lewis to go back over to the table and that he would speak to him shortly.

Moran then told Pasquarelli that there were some nonemployees soliciting in the cafeteria and he pointed out Fishbein and Stenman, and said that he would like to have them removed from the hospital. Moran told Pasquarelli that he already asked them to leave and that they were refusing. Moran stated that he told Pasquarelli that the employees that are seated at the table can stay. Moran told Pasquarelli that he would like his assistance in order to get the nonemployees out.

Pasquarelli informed Moran that there were uniformed officers responding to the call and he said that they would wait until the uniformed officers showed up. When the uniformed officers arrived in the cafeteria, Moran and the police officers had a discussion and a decision was made that officer Yauch would be the spokesman. Moran and the group of police officers then approached the table where Fishbein, Stenman, and the employees were seated. Yauck told them that he was a Pittsburgh police officer and that there had been a complaint that the police were responding to. Moran testified that Yauck said that anybody who was a nonemployee was going to have to leave and the police would escort them out. At that point the group of police officers escorted Fishbein and Steadman out of the building.

That same day Moran prepared a police report regarding this incident (GC Exh. 144), which I have considered in determining the facts regarding this incident. Moran's report indicates, in part: "I proceeded up to the cafeteria and saw a table full of union material and some employees as well as 4 unknown women sitting at the table." After describing his request for Fishbein and Stenman to provide identification, Moran's report reflects: "I proceeded to ask the 2 B/Fs for identification and they refused. At this point I advised the 4 women that they needed to leave the property because they do not have any hospital business here. They all refused."[11]

While many of the operative facts regarding this incident are not in dispute, to the extent the testimony of Moran conflicts with that of Fishbein and Stenman, I generally credit the testimony of Fishbein and Stenman when over that of Moran. As noted above, the testimony of Fishbein and Stenman is mutually corroborative and is further corroborated by Stenman's contemporaneous notes of the incident. At times, Moran's testimony appeared to overstate certain aspects of the incident in order to buttress the Respondent's defense. For example, although I do not think this fact to be of any real significance in deciding this issue, Moran testified on direct examination that immediately after he first observed Stenman and Fishbein and a group of employees in the cafeteria and went to make a phone call to report to Charley, Lewis stood close by him while he made the call. (Tr. 2820–2821.) On cross-examination, however, Moran testified did Lewis did not him approach him at that time (Tr. 2857). In addition, the report Moran made of the incident does not contain any specific reference to making a call to Charley immediately after observing the group seated at the table or to Lewis' close presence to him during such a call. The report does corroborate Moran's testimony, however, that Lewis stood close by Moran in his later phone calls to Charley and corporate counsel.[12]

I credit Moran's testimony regarding the conversations he had with police officers outside of the presence of Fishbein and Stenman as his testimony in that respect is uncontradicted and plausible. I also credit his testimony that officer Yauck stated that anyone seated in the group who was not a hospital employee would have to leave the cafeteria. Moran's testimony that Yauck made such a statement is consistent with what Moran asked the officers to do when they first arrived in the cafeteria. I also note that the testimony of Stenman and Fishbein was very general with regard to what officer Yauck said to the individuals seated at the table. I find Moran's accounts regarding this issue to be more reliable. I also credit Moran's admissions that he informed Fishbein that she could "suffer the consequences" if she refused to provide him identification and that he instructed the two union representatives, the individual referred to as Terry Brown, and one other unidentified black female that they had to leave the cafeteria as soon as they finished their lunch.

I find that the credible evidence establishes the following operative facts. Fishbein and Stenman arrived in the cafeteria at Presbyterian hospital at approximately 11:30 a.m. to discuss the Union's campaign with employee supporters of the Union. Thereafter, Moran received two reports regarding the fact that nonemployees were in the cafeteria soliciting for the union and the union flyers are being distributed. After discussing these reports with his superior, Charley, Moran went to the cafeteria and first looked to see if there were any flyers being distributed. After he did not observe the distribution of any flyers, he observed four individuals who he did not recognize seated at tables along with some individuals who he recognized as employees. At approximately 12:40 p.m., Moran approached the group and asked Fishbein what she was doing there when asked to see her identification. Fishbein asked Moran who he was and then Moran replied that he was a police officer, Fishbein asked to see his badge, which Moran showed her. Fishbein stated that she was not an employee but was there having lunch and talking about the union. When Fishbein asked why Moran was "harassing" them, Moran replied that he was investigating a complaint about unauthorized persons being in the cafeteria. Fishbein asked Moran if he had heard about the settlement that had recently occurred that brought employees back to work and also indicated that employees have the right to talk about the Union in nonpatient areas. Moran said he had heard about the settlement and talked to counsel about it and then asked Fishbein again for identification saying that if she refused she could suffer the consequences. After Fishbein provided her identification, Moran instructed her that she was going to have to leave the cafeteria. After establishing that Stenman was not an employee and after obtaining her name, Moran also instruct-

[11] I find that the reference to "2 B/Fs" to mean two black females.

[12] Although Lewis testified at the hearing he did not testify regarding the incident in the cafeteria.

ed her that she would have to leave the cafeteria. Moran stated that the only individuals authorized to be in the cafeteria were patients, their families, visitors of patients, and employees.

Moran then asked the employees seated at the table for identification but several of them, although indicating they were employees, refused to provide identification. Moran stated that Fishbein, Stenman, the individual referred to as Terry Brown, and an unidentified black female, who refused to provide identification, had to leave after they finished lunch because they did not have any hospital business. Fishbein replied that they were having lunch and were not leaving. Moran then updated Charley regarding the situation by phone and then called 911.

Detective Pasquarelli of the Pittsburgh police was the first police officer to arrive pursuant to Moran's 911 call. Moran told him that there was some nonemployees' soliciting for the Union in the cafeteria and that he had already asked them to leave but they had refused. Pasquarelli informed Moran that there were uniformed officers responding to the call and they would wait until they arrived. Thereafter four uniformed Pittsburgh police and two University of Pittsburgh police officers arrived. After Moran and the group of officers determined that Pittsburgh police officer Yauch would be the police spokesperson, Moran, Pasquarelli and the uniformed officers approached Fishbein, Stenman, and the employees seated at the table. After identifying himself, Yauck indicated that the police had received a 911 call from the hospital regarding unauthorized people being in the cafeteria. Fishbein explained to Yauck that there been a settlement and she was there eating lunch and discussing the Union. Yauck replied that involved a civil case, he was investigating a criminal complaint, and that anyone who was a nonemployee of the hospital would have to leave and the police would escort them out. At that point, Fishbein, Stenman got up from the table and began to leave the cafeteria and the employees seated at the table with them also got up and left with them. The group of police officers escorted Fishbein and Stenman out of the cafeteria and ultimately out of the building.

The Respondent's policy is to respond to reports regarding attempts at solicitation in the cafeteria, but normally it does not monitor who is present in its cafeteria. In this connection, on October 21, 2011, a report was made to security that an individual was soliciting customers for money. Security officers gave the individual or trespass warning and escorted him to the lobby. On June 9, 2012, a supervisor reported to security that an individual he suspected to be union organizer was in the cafeteria approaching employees. The suspected organizer became aware of the supervisor's report to security and left the area before a security officer arrived. (GC Exh. 145.) On June 13, 2012, a report was made to security regarding an individual who was soliciting money from customers and had taken a food item from the cafeteria without paying. After investigating, the security officer explained to the individual that he was trespassing and escorted him from the cafeteria. (R. Exh. 492.) On March 25, 2013, Moran received reports that two individuals were handing out literature in the front of the cafeteria. The individuals stated that they were handing out literature for "Falun Gong." Moran informed them that they were not permitted to solicit on the Respondent's property and they were escorted from the facility (R Exh. 494).

Analysis

The General Counsel contends that the Board has held that, in a hospital setting, that an employer may not restrict solicitation or distribution during nonworking time in nonworking areas, even if the area in question may be accessible to patients. *Brockton Hospital*, 333 NLRB 1367, 1368 (2001). The General Counsel also relies on *Southern Maryland Hospital*, 293 NLRB 1209 (1989), for the proposition that the Respondent in the instant case violated Section 8(a)(1) when it selectively and disparately denied nonemployee union organizers access to its cafeteria, which is generally open to the public. The General Counsel further contends that Moran's actions constituted unlawful surveillance and that his demand that employees show their identification badges while participating in lawful union activities also violated Section 8(a)(1). The Charging Party contends that the Respondent violated Section 8(a)(1) on a basis similar to that advanced by the General Counsel.

The Respondent contends that it has a right to bar union organizers who are engaged in organizational efforts from its cafeteria pursuant to the Board's decision in *Farm Fresh, Inc*., 326 NLRB 997 (1998), and consequently acted lawfully in calling the police to remove the organizers when they refused to accede to Moran's request for them to leave the cafeteria. In further support of its argument that it had a right to exclude the nonemployee union representatives engage in organizational efforts from its cafeteria the Respondent relies on *Oakwood Hospital v. NLRB*, 983 F.2d 698 (6th Cir. 1993); *NLRB v. Southern Maryland Hosp. Center*, 916 F.2d 932 (4th Cir. 1990); *Baptist Medical System,* 876 F.2d 661 (8th Cir. 1989). The Respondent further contends that Moran did not threaten to arrest employees and did not engage in unlawful surveillance. Finally, the Respondent contends that under the circumstances it had a right to request the individuals seated at the table with the union representatives to produce identification to determine who was an employee.

I find that the Respondent's reliance on *Farm Fresh, Inc*., 332 NLRB 1424 (1998) (*Farm Fresh I*), as supporting its right to bar the union representatives from its cafeteria on February 21 to be misplaced. In *Food & Commercial Workers, Local 400 v. NLRB*, 222 F.3d 1030 (D.C. Cir. 2000), the court reversed the Board majority opinion in *Farm Fresh I* and remanded the case to the Board. In its supplemental decision and order, *Farm Fresh, Inc*, 326 NLRB 1424 (2000) *(Farm Fresh II*) the Board specifically noted that the legal issue of whether the Supreme Court's decision in *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992), had effectively overruled the Board's decision in *Montgomery Ward & Co*., 288 NLRB 126 (1988) was not presented in *Farm Fresh I.* The Board therefore vacated the part of the original Board decision that addressed that issue. In deciding the issue in *Farm Fresh II* of whether the employer was entitled to eject to union representatives from its cafeteria solely on the basis of trespass warrants pending against them, the Board adopted and relied on the analysis set forth in the concurring opinion of Members Fox and Liebman in *Farm Fresh I,* 326 NLRB at 1425.

The concurring opinion of Members Fox and Liebman in *Farm Fresh I* that became the rationale for the Board's decision in *Farm Fresh II* noted at 326 NLRB at 1006-1007 that :

> The rule that union organizers cannot be barred from engaging in solicitation in restaurants if they are conducting themselves in a manner consistent with that of other restaurant patrons is specifically predicated on the Supreme Court's admonition in *Babcock & Wilcox*, [351 U.S. 105 (1956)] that an employer's access rules may not discriminate against union solicitation. *Montgomery Ward & Co*., supra at 288 NLRB at 127. As the Board has repeatedly recognized *Lechmere* did not disturb the prohibition against discrimination in *Babcock*. See, e.g., *Schear's* Food Center, 318 NLRB 261 (1965); *Great Scot, Inc*., 309 NLRB 548 fn. 2 (1992), enf. denied on other grounds 39 F.3d 678 (6th Cir. 1994).
>
> The opinion further noted at 1007 that:
>
> [U]nder the long-standing rule reaffirmed by the Board in the 1988 *Montgomery Ward* case, the Board and the courts have traditionally held that union organizers cannot be prohibited from soliciting off-duty employees in restaurants open to the public as long as they conduct themselves in a manner consistent with that of other patrons of the restaurant. 288 NLRB at 126.

I find that the Board's decision in *Farm Fresh II* clearly establishes the continued viability of the Board's decision in *Montgomery Ward*, 288 NLRB 126 (1988). In doing so, it also implicitly reaffirmed the continued viability of the Board's decisions in *Oakwood Hospital*, 305 NLRB 680 (1991); *Southern Maryland Hospital Center*, 293 NLRB 1209 (1989); *Baptist Medical System*, 288 NLRB 882 (1988); and *Southern Maryland Hospital Center*, 276 NLRB 1349 (1985) enf. in relevant part 801 F.2d 666 (4th Cir. 1986).

In these cases, the Board held that it was a violation of Section 8(a)(1) of the Act for an employer to cause the removal of nonemployee union organizers from a hospital cafeteria, open to use by the general public, who were using the cafeteria to meet with off-duty employees while eating in the cafeteria. As noted above, the Respondent relies on circuit court decisions denying enforcement to the Board's order in three cases noted above as supporting its position. With all due respect to the court of appeals for the 4th, 6th and 8th circuits, I am obligated to follow Board precedent unless and until it is reversed by the Supreme Court. *Waco*, *Inc*., 273 NLRB 746, 749 fn. 14 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981); and *Iowa Beef Packers*, 144 NLRB 615, 616 (1963), enfd. in part 331 F.2d 176 (8th Cir. 1964). Accordingly, I will apply the principles expressed in the Board's decisions in *Montgomery Ward*, *Oakwood Hospital*, and both decisions in *Southern Maryland Hospital Center* in deciding whether the Respondent violated Section 8(a)(1) of the Act when it caused the removal of nonemployee union organizers from its cafeteria on February 21, 2013.

The Respondents cafeteria is primarily patronized by employees and visitors to patients, although, at times, patients also use the cafeteria. Union representatives Fishbein and Stenman conducted themselves in a manner consistent with the purpose of the cafeteria. In this regard, they purchased food and beverage and behaved in an orderly fashion. They did not go from table to table in the cafeteria and they did not distribute any union literature while they were there. The union representatives spoke to off-duty employees about the Union and particularly the recent settlement that the Union, the Respondent, and the General Counsel had entered into. It is clear that the Respondent instructed the union representatives to leave the cafeteria and caused the police to remove them because they were discussing union related matters with employees. Under existing Board precedent, set forth in the cases noted above, to exclude the union representatives on this basis treats them in a disparate and discriminatory basis from the other members of the public patronizing the cafeteria. Accordingly, I find that by causing the police to remove the union representatives, the Respondent interfered with the Section 7 rights of its employees to lawfully communicate with the Union and therefore violated Section 8(a)(1) of the Act.[13]

I also find that the Respondent violated Section 8(a)(1) of the Act by Moran's conduct in the remaining in close proximity to the employees speaking to Fishbein and Stenman in the cafeteria. Since the employees were engaged in lawful, protected activity in meeting with and talking to the two union representatives, the Respondent acted unlawfully in engaging in surveillance of such activity. *Oakwood Hospital*, supra at 688-689 and cases cited therein. See also *Southern Maryland Hosp*., 293 NLRB at 1217.

I further find that by asking the employees seated at the table with the union representatives in the cafeteria to provide identification, the Respondent further violated Section 8(a)(1). In *Oakwood Hosp*., supra at 688- 689, the Board found that such conduct is in the nature of unlawful surveillance and discourages employees from engaging in this type of lawful union activity.

Since there is no evidence that the Respondent threatened to arrest employees on February 21, I shall dismiss this allegation in the complaint.

The 8(a)(2) and (1) Allegations

Facts

The complaint alleges that since about February 20, 2013, the Respondent has recognized the ESS employee council at Presbyterian Hospital as the exclusive bargaining representative of its ESS employees at Presbyterian Hospital and has dealt with the ESS employee council concerning working conditions in violation of Section 8(a)(2) and (1) of the Act.

Current employee Shaun Painter testified on behalf of the General Counsel pursuant to a subpoena. At the time of the hearing, Painter worked in the Presbyterian Hospital environmental support services department, also referred to as the housekeeping department. Painter worked in the Montefiore building and had been employed by the Respondent for approximately 4 years. I found Painter to be a credible witness. His

[13] I find that this conduct by the Respondent is sufficiently related to the allegation in par. 11 of the complaint that the Respondent threatened to arrest nonemployees engaged in lawful union activity with its employees to be considered as an unfair labor practice. *High-Tech Cable Corp*., 318 NLRB 280 (1995), enfd. in part 128 F.3d 271 (5th Cir. 1997); *Irving Ready-Mix, Inc*., 357 NLRB 1272, 1785 fn. 13 (2011). Since there is insufficient evidence to support the allegation that the Respondent, through Moran, threatened to arrest nonemployees on February 21, I shall dismiss that specific allegation in the complaint

testimony was detailed and thorough and was consistent on both direct and cross-examination. In addition, as a current employee who was testifying against the interest of his Employer, it is unlikely that his testimony would be false. *Bloomington-Normal Seating Co*., 339 NLRB 191, 193 (2003).

Daniel Gasparovic testified on behalf of the Respondent regarding this issue. Gasparovic is employed by Aramark, one of the Respondent's contractors, and at the time of the hearing was the area manager for health care in the greater Pittsburgh area. In 2012 and 2013 Gasparovic, although employed by Aramark, was the director of environmental services at Presbyterian Hospital. Gasparovic generally testified credibly, particularly with respect to the genesis of the ESS employee council at Presbyterian Hospital. With respect to the actual meetings and operation of the ESS employee council, however, to the extent that Gasparovic's testimony conflicts with that of Painter, I credit Painter. Gasparovic's testimony on those issues was not as detailed as that of Painters and consequently I do not find it as reliable.

Gasparovic testified that during the time he was the director of environmental support services at Presbyterian Hospital, he reported to John Krolicki, the Respondent's vice president of operations. Five managers, who were employed by Aramark, reported to Gasparovic, as did approximately 13 supervisors, who were employed by the Respondent. There were approximately 260 environmental services support employees employed at Presbyterian Hospital in 2013.

In approximately August 2012, Krolicki informed Gasparovic that an employee council had been established by the Respondent at Shadyside Hospital and asked Gasparovic if one could be formed at Presbyterian Hospital. In this connection, Krolicki asked Gasparovic to contact Amy DiPasquale, who was the director of environmental support services at Shadyside Hospital, to find out how the Shadyside employee council operated. Krolicki also told Gasparovic that the Shadyside employee council had established bylaws that could be used at Presbyterian Hospital. Gasparovic then contacted DiPasquale and she sent the Shadyside employee council bylaws to him by email.

The Respondent then posted a notice inviting employees to join an employee council at Presbyterian Hospital. Painter testified that he observed a notice posted on a bulletin board near the employee time clock in the Montefiore building. The notice indicated that a council was being established to discuss employment issues and that a manager would be present for all of the meetings. Employees were asked to sign an attached sign-up sheet if they were interested. Painter signed the sign-up sheet and 1 week later he was informed by his supervisor that he was on the employee committee and the date, time, and place of the meeting.

According to Gasparovic's uncontradicted testimony, approximately 10 employees signed the signup sheets and all of those employees were invited to attend the first meeting. The meeting was conducted at sometime in October 2012, at 3 p.m.in the manager's conference room at the BMT building in Presbyterian Hospital. Gasparovic determined the date, time, and place of the first meeting.

Painter was present at the first meeting along with employees Donna Green, Janine Graham, Lucas Cope, Sade Russell, and William Wingo, all of whom were housekeeping employees in the Montefiore building. In addition, employee Andrew Pitt, who was employed in the Presbyterian building was also present. Gasparovic was also present. All of the employees who attended were on the work schedule at the time of the meeting and all were paid for their attendance at this meeting and all future ESS employee council meetings.

Gasparovic began the meeting by indicating that the purpose of the ESS employee council was to be involved in process improvement, team building and increasing morale. Gasparovic passed out the Shadyside employee council bylaws that he had received from DiPasquale and stated that they had seemed to work well for that organization. The employee Council members approved the Shadyside employee council bylaws and mission statement in its entirety except for a change as to the date and time for future meetings. Gasparovic said that he would be attending the future ESS employee council meetings. Painter testified that Gasparovic also told the employee members of the ESS employee council that he would be the liaison between it and upper management and that "anything that the committee came up with as far as ideas, he would take them and see whether or not would be feasible for us to do." (Tr. 1350.)

The ESS employee council met again 2 weeks after the initial meeting. At this meeting, even though no vote had been taken by the committee, Gasparovic informed the employee council members that Janine Graham was the chairperson of the ESS cmployee council and Sade Russell in and Andrew Pitt would share the co-chairperson position.

At one of the early ESS employee council meetings, Pitt raised the issue of employees "hoarding" mop heads and not returning them to the appropriate location so that other employees may use them. This caused a shortage for other employees regarding that piece of equipment. ESS Employee Council members also discussed a concern that some housekeeping employees were not using the appropriate machine to distribute the proper amount of cleaning chemicals, but rather were just pouring them into cleaning equipment. This resulted in an improper concentration of chemicals to water and was a wasteful practice that at times led to a shortage of supplies. With regard to the usage of chemicals and the issue of employees retaining mop heads, the committee proposed to Gasparovic that the Respondent provide them bulletin boards in both the Presbyterian and Montefiore buildings in order to carry out an educational campaign to the housekeeping employees on these and other topics. Gasparovic admitted that this issue of not having enough supplies when employees started their shifts was an important issue to council members (Tr. 3007). In response to this request, Gasparovic had the maintenance staff put up new bulletin boards for the ESS employee council in both the Presbyterian and Montefiore buildings.

ESS employee council members Graham, Cope, and Russell placed letters at the top of each bulletin board stating "ESS Council." Committee members posted on the bulletin boards a cartoon with a caption stating "Don't be a deadhead, return your mop heads." The two bulletin boards also contain information about properly mixing the appropriate chemical solu-

tions for use in cleaning.

At an ESS employee council meeting held in the fall of 2012, a council member raised the issue that some employees were not returning their cleaning carts to the appropriate designated area and that when the next shift came in to work, some employees would have to spend time locating the cleaning cart and the appropriate supplies. The ESS employee council proposed to Gasparovic that the carts be locked in the location to which they should be returned, so that the employees on the next shift would have to use their own carts. After the ESS employee council raised this issue with Gasparovic, he spoke to supervisors about the issue and a few days after the council meeting, supervisors advised employees that they were to return their cleaning cart to the appropriate location at the end of their shift.

At one of the early meetings ESS employee council members also raised an issue with Gasparovic regarding the department dispatcher calling employees to give them their next assignment during their lunch break. When employees would not immediately return her calls, the dispatcher would complain to an employee in a lunchbreak that her call was not returned sooner. Gasparovic indicated that he would speak to the dispatcher and supervisors about this issue and thereafter, for the most part, the dispatcher did not call people during their lunch breaks.

At the ESS employee council's third meeting in approximately December 2012, members discussed a proposal advanced by Graham regarding having an "Employee of the Month Award " (EOM award) in the Presbyterian and Montefiore buildings, in order to recognize environmental service employees for performing good work. In establishing the basis to grant such an award the Council discussed with Gasparovic what the criteria should be. When ESS employee council members were having difficulty in determining what the criteria should be, Gasparovic suggested that the awards be based on based on employees' attendance records and their HCAP scores.[14] The ESS employee council members agreed with Gasparovic's suggestion. At the first meeting when the issue of the EOM award was discussed, ESS employee council members proposed to Gasparovic that the winner of each award be given a month of free parking or a bus transit pass for the month. The ESS employee council also considered and proposed to Gasparovic that the Respondent award the winners a grocery store or gas station gift card. Gasparovic indicated that he had to discuss with human resources whether these proposals would be approved. At approximately the fifth ESS employee council meeting, Gasparovic and Graham told the employee council members that the other proposals made by the employee council were too expensive and that the employee of the month award would be a $25 Visa gift card.

With regard to the determination of the two EOM award recipients, Gasparovic would review the HCAP scores and attendance record and announce to the council members at a meeting the employee in each building that had the highest score and best attendance. Those individuals were the winners of the award. The money for the gift cards came from Aramark and was accounted for in Aramark's budget for services that are provided to the Respondent. [15] The first EOM awards were given in January 2013. (GC Exh. 83(c).)

After the winners of the EOM awards were determined, the photographs of the winners were taken, and were posted on the ESS employee council bulletin boards in both the Presbyterian and Montefiore buildings. At the monthly departmental meeting of the environmental services department, which was attended by approximately 100 employees, the manager conducting the meeting would present the EOM award winners with their gift cards. At these meetings, the Respondent set aside time for ESS employee council chairperson Graham to speak. Graham would discuss activities that the employee council was involved in including the EOM award. The Respondent prepared minutes of the monthly departmental meetings which were posted on bulletin boards in both the Presbyterian and Montefiore buildings which included Graham's monthly ESS employee council reports and the announcement of the EOM award winners. (GC Exh. 83.)

At one of the ESS employee council meetings, Painter raised an issue regarding the fact that second shift employees at Montefiore were being required to perform work extra at Presbyterian because the second shift housekeepers assigned to Presbyterian would regularly call off without any action being taken against them. This meeting was attended by Gasparovic and another manager, either Krolicki or Tom Faulk. Painter could not recall specifically who the other manager was. Painter was asked what he thought could be done about that and he responded that discipline should be imposed on the people who were calling off every weekend. Painter was told that management would look into the issue but there is no evidence that any changes were made as a result of the ESS employee council's proposal.

At one of the ESS employee council meetings, members also raised with Gasparovic the fact that the department printer was broken and requested a new one. While Gasparovic indicated that he would look into having the printer replaced, there is no evidence that it was. Similarly, an issue was raised at a meeting about the Respondent needing to monitor the stock of housekeeping supplies and supply closets. While Gasparovic indicated that he would look into that issue, there was no evidence that the Respondent instituted any changes pursuant to this request.

At one meeting, an employee council member stated her desire for a reevaluation of her work assignments as she believed she had too much to do. Painter acknowledged, however, that this employee had a tendency to complain about her work assignments. While the Respondent did, in fact, alter work assignments after this meeting, Gasparovic testified, without contradiction, that the distribution of work in the ESS department is regularly reviewed and revised periodically.

The distribution of work is determined by computerized pro-

[14] HCAP scores are based on a supervisor's review of a housekeeping employee's work in keeping his or her assigned area clean.

[15] While Aramark had previously given $25 gift cards to employees on a somewhat regular basis, those were based on recommendations from a patient or a doctor and were not given on the basis of the objective, performance related criteria established by the Respondent and the ESS employee committee.

gram that considered factors such as square footage, the type of room to be cleaned, and the frequency of tasks to be performed in the room. Gasparovic further testified that the changes that were made in 2013 were instituted as a result of the application of the Respondent's normal processes and that nothing was changed because of any discussions regarding work assignments that were conducted in the ESS employee council. I find, based on the record as a whole, that any changes in the distribution of work that occurred in 2013 did not occur as a result of any proposals made by the ESS employee council.

On May 26, 2013, the ESS employee council held a social event, referred to as a "Memorial Day picnic," on the 7th floor of the Montefiore building. Next to the room where the food was located there was an outdoor space where people could sit and eat. The Respondent donated the meat that was prepared for the picnic and assigned one or two dietary employees to assist in preparing the food for this event. For several months prior to this event, the ESS employee council held bake sales and candy sales at the Respondent's facility to raise money for this event. Gasparovic donated $100 of his own money to assist in getting the fundraising efforts going. The bake sales were located on the third floor of the Montefiore building, outside of a supervisor's office. One manager baked some items for the bake sales and several supervisors purchased baked goods. The candy sales were held in a management office. The Respondent also permitted employees to post flyers regarding this event throughout the hospital. As part of its effort to raise funds for the Memorial Day picnic, the ESS employee council sold raffle tickets for a "Work Your Boss Day." The winner of the raffle could choose a manager or supervisor in the environmental services department to perform the winning employee's work for half a day.

The ESS employee council stopped meeting and conducting activities in September or October 2013.

Analysis

The General Counsel and the Union contend that the ESS employee council is a labor organization as defined in Section 2(5) of the Act and that the Respondent has dominated and interfered with the formation and administration of the ESS Employee Council within the meaning of *Electromation, Inc*., 309 NLRB 990 (1992), enfd. 35 F.2d 1148 (7th Cir. 1994), and *E. I. DuPont & Co*., 311 NLRB 893 (1993) and therefore has violated Section 8(a)(2) and (1) of the Act.

The Respondent contends that the ESS employee council is not a labor organization as defined in the Act as it did not it did not deal with the ESS employee council regarding mandatory subjects of bargaining. The Respondent also contends that it did not dominate or otherwise interfere with the operation of the ESS employee council.

Section 2(5) of the Act provides:

> [t]he term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

In the instant case, it is clear that employees participated in the ESS employee council. The real issue in determining whether the ESS employee council is a labor organization within the meaning of the Act is whether it exists for the purpose, at least in part, of "dealing with" the Respondent concerning the matters set forth in Section 2(5). In *EFCO Corp*., 327 NLRB 350, 353 (1998), the Board held:

> The concept of "dealing with" essentially involves a bilateral process, ordinarily entailing a pattern or practice by which a group of employees makes proposals to management and management responds to these proposals by acceptance or rejection by word or deed. *E. I. du Pont & Co*., 311 NLRB 893, 894 (1993). In *NLRB v. Cabot Carbon Co*., 360 U.S. 203, 210- 211 (1959), the Supreme Court held that the term "dealing with" in Section 2(5) is broader than the term "collective bargaining" and applies the situations outside the negotiation of collective-bargaining agreements.

In the instant case, the evidence set forth above establishes that employee members of the ESS employee council raised issues regarding the working conditions of the employees in the Respondent's environmental services department. For example, the ESS employee council members raised the issue of employees hoarding mop heads and improperly mixing cleaning solvents, both of which caused the shortage of supplies. In order to address this problem, the ESS employee council proposed that the Respondent provide it with bulletin boards so that the ESS employee council could post materials urging employees to follow proper procedures regarding the use of equipment and supplies. The Respondent responded to this proposal by placing two bulletin boards in both the Presbyterian and Montefiore buildings and allowing ESS employee council members to post materials on those boards regarding the proper use of cleaning equipment and supplies.

The ESS employee council also raised the issue of the dispatcher notifying employees of their next assignment while they were on a lunchbreak. Gasparovic responded by saying that he would speak to the dispatcher and supervisors involved about this concern of ESS employee council members and thereafter such calls stopped for the most part.

ESS employee council members raised the issue of the failure of some employees to return their cleaning carts to the appropriate designated area, causing the employees on the next shift to spend time locating the cleaning cart and the appropriate supplies. The ESS employee council proposed that the areas to which the carts were returned be locked, so that the employees on the incoming shift would have to use their own carts. In response, Gasparovic spoke to supervisors and, a few days after this ESS employee council meeting, supervisors instructed employees that they were to return their cart to the appropriate location at the end of their shift.

As noted above, the ESS employee council proposed that employees be given an employee of the month award but had difficulty in determining what the criteria should be. Gasparovic suggested criteria and the ESS employee council agreed with his proposal. The ESS Employee Council also made suggestions as to the appropriate benefit that an employee should receive for this award. Gasparovic indicated that he would dis-

cuss this issue with human resources and respond at a later meeting. Gasparovic later indicated that some of the proposals made by the ESS employee council were too expensive and that the employee of the month award would be a $25 Visa gift card.

Other issues raised by the ESS employee council such as a broken printer, a suggestion that the Respondent more closely monitor cleaning supplies and the apparent avoidance of some employees to working on weekends, were not specifically addressed by the Respondent. However, when these issues were raised, Gasparovic told ESS employee council members that management would "look into" the issues raised, and they were never informed that these were inappropriate topics for the ESS employee council to raise.

I find that the evidence establishes that the Respondent engaged in "dealing with" the ESS employee council with respect to the subjects set forth in Section 2(5) of the Act. The process between the ESS employee council and the Respondent was bilateral in that employee members of the ESS Employee Council made proposals and a management representative, typically Gasparovic, responded to the proposal and often granted it. This process occurred on a regular basis over a sustained period of time and numerous proposals were made. Applying the principles expressed above to the circumstances present in this case, I find that the ESS employee council and the Respondent dealt with each other over wages and conditions of work, subjects enumerated in Section 2(5) of the Act.

In *Electromation*, supra, 309 NLRB at 995 the Board held that a labor organization that is the creation of management, and whose structure, function, and continued existence are essentially determined by management, is one whose formulation or administration is dominated under Section 8(a)(2).

In the instant case, it was the Respondent's idea to create the ESS employee council as the Respondent's vice president Krolicki suggested to Gasparovic that he solicit volunteers to establish such a committee at Presbyterian Hospital. Krolicki also suggested that Gasparovic contact the director of environmental services at Shadyside Hospital and obtain the bylaws that the employee council at that hospital was using. The Respondent, through Gasparovic, then solicited volunteers from the Presbyterian ESS department and determined the date and time and place of the initial meeting. This meeting was held in a management conference room as were all the other committee meetings. At the first meeting, Gasparovic presented at the ESS employee council with the Shadyside employee council bylaws, which the ESS employee council accepted as their own with one minor exception

Despite telling the ESS employee council members at the first meeting that they would vote on a chairperson and co-chairpersons, at the second meeting Gasparovic and informed the ESS Employee Council that Graham was the chairperson and that two other employees had been designated as co-chairpersons.

The ESS employee Council's fundraising efforts, the "Work Your Boss" raffle, the bake sales and candy store, all required the use of the Respondent's facility and the permission of management. The employee of the month award was determined based on information supplied by management and management funded the gift cards that were given to the selected employees. The Respondent specifically provided the ESS employee council with bulletin boards to promote its activities. It is clear that the ESS employee council's activities were all conducted inside the facility and done with the Respondent's approval and assistance. There is no evidence that the ESS employee council conducted any activities outside of the facility. In *Miller Industries Towing Equipment*, 342 NLRB 1074, 1090 (2004), the Board found that a"continous improvement committee" that dealt with the employer regarding mandatory subjects of bargaining was formed, sponsored and assisted by the employer in violation of Section 8(a)(2) and (1). In so finding the Board specifically noted that there was "no evidence that the committee had any independent existence outside the will of Respondent."

I also note that the Respondent formed and assisted the ESS employee council in the context of the Union's organizing campaign that was directed toward employees that included the environmental services department employees. As set forth in this decision, I find that the Respondent responded to this campaign, in part, by the commission of unfair labor practices. Under the circumstances present here, I find that the Respondent's initiation and support of the ESS employee council was designed to interfere with employee free choice in selecting a bargaining representative.

I find the instant case to be distinguishable from *Stoody Co*., 320 NLRB 18 (1995), which is relied on by the Respondent. In that case the employer established a handbook committee and contributed financial support to it. The purpose of that committee was to gather information about different areas in the handbook that were inconsistent with current practices, obsolete, or misunderstood by employees in order for the employer to revise the handbook. However, the handbook committee conducted only one meeting that lasted for 1 hour. The Board concluded that the 1-hour meeting did not establish a pattern or practice of dealing with the employer. In the instant case, as set forth in detail above, the Respondent, after establishing the ESS employee council, engaged in a practice of dealing with it for a period of approximately 10 months.

On the basis of the foregoing, I find that the Respondent violated Section 8(a)(2) and (1) by initiating, forming and thereafter sponsoring, assisting and dominating the ESS employee council.

The Alleged Discriminatory Application of the Respondent's Solicitation Policy

Paragraph 27 of the complaint alleges that during the time material to the complaint. Respondent maintained a solicitation policy which reads, in pertinent part, as follows:

> II. SCOPE
>
> This policy applies both to the person doing the soliciting or distribution of literature and the person being solicited or receiving the distribution in UPMC facilities located in the United States.
>
> . . .
>
> IV. PROCEDURE
>
> A. No staff member shall engage in solicitation of other staff

members, patients, and visitors during working time.

B. No staff member may engage in solicitation during working or nonworking time in patient care areas, such as patient rooms, operating rooms, patient lounges, areas where patients received treatment, corridors and sitting rooms adjacent to patient care areas if a patient or family member is present. For other work areas, no staff member may engage in solicitation during working time.

C. No staff member may distribute any form of literature that is not related to UPMC business or staff duties at any time in any work area, patient care, or treatment areas. Additionally, staff members may not use UPMC electronic messaging systems to engage in solicitation . . .

E. Only professional recognition, employer service pins and staff member ID badges may be worn in patient care or treatment areas.

G. All situations of unauthorized solicitation or distribution must be immediately reported to a supervisor or department director and the Human Resources Department and may subject the staff member to corrective action up to and including discharge.

As finally amended, paragraph 34 of the complaint alleges that the Respondent, through named supervisors, on dates listed below, disparately enforced the above noted rule by requiring employees to remove items bearing prounion insignia, while permitting its employees to wear, in patient care areas, items bearing insignia that did not qualify as "professional recognition, items, "employer service pins" and/or "staff member ID badges."

(d) April 2013-Tim Nedley
(e) April 5, 2013-Lisa Fennick
(f) April 16, 2013- Carlton Clark
(g) February 2013-Nickolai Stoichkov[16]

Paragraphs 29 and 30 of the complaint allege that the Respondent, in March 2013, through Denise Touray and Emily Bowman, disparately enforced the above noted solicitation rule by permitting employees to utilize the Respondent's bulletin boards for purposes not related to Respondent sponsored matters but prohibiting employees from posting items in support of the Union on such bulletin boards.

With respect to the allegations of paragraphs 34, I will address only paragraph 34(e) in this section of the decision. Turner is the primary witness with respect to paragraphs 34(d) and (f). David Jones is the primary witness with respect to paragraph 34(g). I will address those allegations of the complaint in relation to discussion of the 8(a)(3) and (1) allegations regarding Turner and Jones.

Several witnesses testified on behalf of the General Counsel regarding the Respondent's practice with respect to the wearing of various insignia on employee uniforms and with respect to its practice of posting materials on bulletin boards. Employees are required to wear an ID badge attached to their uniform while at work. Current employee Chaney Lewis testified that at the time of the hearing he had been employed by the Respondent for 9 years as a transporter in the Respondent's transportation department. By virtue of his position Lewis transports patients in patient care areas. Lewis testified during the entire time of his employment he has observed employees in the transportation department with lanyards attached to their ID badges with various insignia that had not been issued by the Respondent. Lewis testified that the entities displayed on lanyards worn by employees included the Cleveland Browns, Pittsburgh Penguins and the US Army. Lewis often wore a lanyard stating, "WPIAL Wrestling."[17] Lewis is an open union supporter and after the campaign began he also often wore a purple and yellow lanyard stating "You Can't Stop Us Now" with the Union's logo on it.

Shortly after the settlement agreement in Case 06–CA–081896 was entered into between the General Counsel, the Respondent, and the Union on February 7, 2013, Lewis received a call from his immediate supervisor, Darnell Grinage, instructing him to report to the office of the transportation department manager, Denise Touray.[18] Jackie Loveridge, a human resources consultant, was also present for the meeting. Touray told Lewis that the purpose of the meeting was to explain the terms of the settlement agreement and the new solicitation policy and how it affected him. At this meeting, Touray explained the rules that Lewis should follow according to the new solicitation policy. Touray told Lewis that he was able to pass out union literature in the break room only during nonworking hours and that he was not allowed to enter the facility if he was not working.

According to Lewis, both Loveridge and Touray spoke to him about the bulletin boards in the hospital. Lewis was told that he could not post literature on the bulletin boards anywhere in the hospital unless it was UPMC issued material. Lewis asked whether that instruction covered the bulletin boards in the break room. Loveridge answered and confirmed that he was not allowed to post union material on the bulletin boards in the break room. Lewis was also told that he could go to the cafeteria and pass out literature on nonwork time. Lewis was further informed that he was not permitted to wear any buttons that were not UPMC related.

Approximately 20 minutes after his meeting with Touray and Loveridge, Lewis received a call from Grinage, who told Lewis that he had received instructions to tell Lewis to remove the lanyard that he was wearing displaying support for the Union. Lewis went to the locker room and removed his union lanyard and put on his WPIAL lanyard.

Since that time, Lewis has continued to wear his WPIAL lanyard but has not worn his union lanyard. Since that date Lewis has continued to see transportation department employees wear lanyards that do not refer to UPMC. He has worn his WPIAL lanyard in the presence of his supervisors Hank Ran-

[16] The General Counsel amended the complaint at the beginning of the hearing to add the allegation contained in paragraph 34g.

[17] WPIAL stands for Western Pennsylvania Interscholastic Athletic League.

[18] Pursuant to the terms of the settlement agreement, a final written warning issued to Lewis was rescinded and he was offered monitor technician training.

kin, Denise Touray, Carolina Clark, and Ed Keller and none of his supervisors have instructed him to remove that lanyard. The testimony of Lewis on these issues is uncontradicted

Former employee Bonita McWhirter was employed by the Respondent as a patient care technician from September 2007 until August 2013, when she voluntarily resigned. As a patient care technician McWhirter worked in patient care areas. The uncontradicted testimony of McWhirter establishes that for several years prior to March 2013 she had worn a "heart" lanyard that was pink and attached to that was a "Pillsbury doughboy" pin about 4 inches long. The Pillsbury doughboy pin had been given to her by her grandchildren. In March, around St. Patrick's Day, McWhirter had always worn a St. Patrick's Day pin.

McWhirter was an open union supporter and, during the period from January to March 20 13, she wore union insignia in addition to the other personal insignia displayed on her uniform. In January 2013, McWhirter wore a black and gold union pin stating "Make It Our UPMC" for 1 day.

In mid-March 2013, McWhirter wore her union pin for the second time along with a lanyard with the Union's logo on it and the legend "Can't Stop Us Now!" On this particular day she also was wearing her heart lanyard, and Pillsbury doughboy and St. Patrick's Day pins. Her supervisor, Mara Schubert called McWhirter into her office to discuss her annual evaluation with her. Marina Goodman, a human resources representative, was also present. Goodman told her that they have heard that she was talking to a new employee in housekeeping about the Union and that she was not allowed to talk about the Union at work. Goodman also told her that she needed to take off the union lanyard and pin, the heart lanyard and the Pillsbury doughboy pin. McWhirter immediately took off those items. McWhirter asked why she had to take off her Pillsbury doughboy pin and further asked, "What am I doing, soliciting for Pillsbury doughboy." Goodman said she had to take all of those items off because of the settlement between the NLRB and UPMC and because it did not meet the dress code. Goodman did not instruct McWhirter to take off her St. Patrick's Day pin and she left that on. Goodman gave her an ID holder with the UPMC logo on it that stated, "We Care" which McWhirter put on. After this meeting McWhirter continued to see employees wear lanyards reflecting entities not associated with the Respondent, and Steelers and St. Patrick's Day pins.

Current employee Jamie Hopson has worked for the Respondent since October 2010 as a patient care technician for the Respondent. In April 2013 she was working in the Montefiore building on unit 12 S. Her supervisor was Lisa Fenick. One day in April 2013 Hopson wore a badge pull given to her by the Union that stated "Can't Stop Us Now" in purple letters. On top of the above noted legend Hopson had pasted a sticker that stated, "We're With Ron."[19] According to Hopson's uncontroverted testimony, when she approached the nurses' station on unit 12 S, Fenick told Hopson to take the "We're with Ron" sticker off and she immediately did so. Fenick did not indicate why Hopson had to take off the sticker. Hopson had been wearing the sticker for about an hour. Fenick did not say anything about the badge pull that stated "Can't Stop Us Now" and Hopson continued to wear it.

[19] The "Were With Ron" stickers were given to employees by the Union and reflected support for employee Ron Oakes. As noted above, Oakes was reinstated pursuant to the settlement agreement on February 25, 2013. He was discharged again on March 20, 2013

The Alleged Disparate Enforcement of the Solicitation Policy regarding Union Insignia

The General Counsel does not contend that the solicitation rule set forth above, which was amended on February 27, 2013, is facially invalid. Rather, the General Counsel contends that the evidence establishes that the Respondent enforced its solicitation policy in a discriminatory manner against union supporters.

The Board has long held that the application of a presumptively valid rule in a disparate manner violates Section 8(a)(1) of the Act. *Circuit-Wise, Inc*. 306 NLRB 766, 787–788 (1992); *South Nassau Hospital*, 274 NLRB 1181 (1185); *St. Vincent's Hospital*, 265 NLRB 38 (1982), enfd. in pertinent part 729 F.2d 730 (11th Cir. (1984).

Recently, the Board has summarized its policy with respect to the right to wear union insignia in a health care institution. In *Healthbridge Management, LLC*, 360 NLRB 937, 938 (2014), the Board stated:

> It is well established that employees have a protected right to wear union insignia at work in the absence of "special circumstances." See *London Memorial Hospital*, 238 NLRB 704, 708 (1978); *Ohio Masonic Home*, 205 NLRB 357 (1973), enfd. 511 F.2d 27 (5th Cir. 1975); see also *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-803 (1945). In healthcare facilities, however, the Board and the courts have refined that basic rule due to concerns about the possibility of disruption to patient care. In nonpatient care areas, restrictions on wearing insignia are presumptively invalid in accordance with the basic rule, and it is the employer's burden to establish special circumstances justifying its action. *Casa San Miquel*, 320 NLRB. 534, 540 (1995); see also *NLRB v. Baptist Hospital*, 442 U.S. 773, 781, (1979); accord: *St. John's Hospital*, 222 NLRB 1150, 1150-1151 (1976). By contrast, restrictions on wearing insignia in immediate patient care areas are presumptively valid. See *Baptist Hospital*, above. That presumption of validity, however, does not apply to a selective ban on only certain union insignia in immediate patient care areas. See *St. John's Health Center*, 357 NLRB No. 170, slip op. at 2 (2011). In those circumstances, it remains the employer's burden to establish special circumstances justifying its action; specifically, that its action was "necessary to avoid disruption of health-care operations or disturbance of patients." *Beth Israel Hospital v. NLRB*, 437 U.S. 438, 507 (1978).

In the instant case, the Respondent required Hopson to remove the "We're with Ron" union sticker she was wearing in April 2013. The credited testimony of McWhirter and Lewis establishes, however that the Respondent permitted employees to wear insignia regarding professional sports teams, local youth wrestling, the United States Army, St. Patrick's Day pins, and other personal messages, in immediate patient care areas. Since the Respondent allowed other types of insignia to be

worn in immediate patient care areas, it cannot rely on the presumed validity of a ban against wearing all nonofficial insignia in patient care areas in barring the union sticker that Hopson was wearing in April 2013. *St. John's Hospital*, 337 NLRB 94, 95 (2011).

The next issue is whether the Respondent was justified in instructing Hopson to remove the "We're With Ron" union sticker based on special circumstances establishing that it was "necessary to avoid disruption of health-care operations or disturbance of patients." The Respondent presented no evidence to support a reasonable belief that banning the wearing of Hopson's union sticker was justified by any special circumstances. Accordingly, applying the principles set forth above, I find that the Respondent violated Section 8(a)(1) of the Act when it required Hopson to remove her union sticker in April 2013.[20]

The Alleged Disparate Application of the Respondent's Policy Regarding Bulletin Boards

As noted above, paragraphs 29 and 30 of the complaint allege that the Respondent, in March 2013, through Denise Touray and Emily Bowman, disparately enforced the above noted solicitation rule by permitting employees to utilize the Respondent's bulletin boards for purposes not related to Respondent sponsored matters but prohibiting employees from posting items in support of the Union on such bulletin boards.[21]

In addition to the testimony of Lewis noted above, several other witnesses testified on behalf of the General Counsel regarding the Respondent's policy with respect to the posting of materials on bulletin boards. Felicia Penn testified the "work room" utilized by anesthesia technicians at Presbyterian Hospital contained a bulletin board. According to Penn's credited testimony, employees posted a number of personal items on the bulletin board such as information regarding the rental of homes and the sale of cookies. Penn indicated that she posted several different items in support of the Union on the bulletin board but generally these items were taken down by the time she returned to work the next day.

Penn recalled having a telephone conversation with Emily Bowman, a human resources representative about this bulletin board in 2013 although Penn could not recall the date.[22] Penn was discussing a grievance with Bowman when Bowman asked where Penn was posting things at work regarding the Union. Penn replied that she posted union material on the bulletin board in the work room. Bowman said it was up to the discretion of her manager as to what could be posted on that bulletin board, but that Penn was not allowed to post anything to do with the Union on the bulletin boards at work.

McWhirter testified that in January 2013 in unit 7D of Presbyterian Hospital there were two bulletin boards in the break room. One bulletin board had work related issues posted on it, such as proper skin care for patients. The other bulletin board had personal items post on it, such as Christmas cards, letters to the staff and patients, and notifications regarding charity events for organizations such as the American Heart Association. In the main all of unit 7D the was a "Kids and Critter's" bulletin board on which employees posted pictures of their families and pets.

During the period from January through March 2013 McWhirter posted union materials on approximately 15 occasions on both bulletin boards in the break room. Within a very short period of time these items would be removed but McWhirter did not know who removed them or the reasons for their removal On one occasion she posted on the " Kids and Critter's" bulletin board a newspaper article relating to the reinstatement of Ron Oakes. RN Ronnie Hall told McWhirter that she had to take it down pursuant to the instructions of supervisor Mara Schubert. McWhirter continued to see personal postings on the nonwork related bulletin board until she left her employment in August 2013.

Current employee Lou Berry also testified on behalf of the General Counsel regarding materials posted on the Respondent's bulletin boards. At the time of the hearing, Berry had been

[20] As noted above I have relied on the testimony of Lewis and McWhirter in finding this violation. Although there are no allegations in the complaint alleging that the Respondent violated Section 8(a)(1) by requiring McWhirter and Lewis to remove union insignia, in his post-hearing brief the General Counsel urges me to find that these incidents are violative of the Act. The Union also urges me to make such a finding in its post hearing brief. I decline to do so. At the hearing, the Respondent objected to the testimony of Lewis regarding the solicitation rule and its alleged disparate enforcement, contending that there were no complaint allegations regarding this issue. In response to this objection, the General Counsel indicated that this testimony was directly related to the existing allegations of the complaint regarding the solicitation rule (Tr 562). At no time during the hearing did the General Counsel move to amend the complaint to allege the incidents involving Lewis and McWhirter constituted separate unfair labor practices. If the General Counsel wished to amend the complaint to allege additional violations of the Act, the time to take such action was before the General Counsel rested his case in chief. Under the circumstances present in this case, I find that the Respondent was deprived of the opportunity to defend the incidents involving Lewis and McWhirter as separate unfair labor practices and accordingly I will not consider them as such. See *Desert Aggregates*, 340 NLRB 289, 292–293 (2003).

[21] While the above noted solicitation policy does not specifically refer to bulletin boards, I note that the Respondent's corrective action and discharge policy that became effective on August 30, 2012, provides that a written warning can be issued for the "unauthorized use of business unit bulletin boards." (GC Exh. 161, p. 2.) While these allegations of the complaint are inartfully drawn because of their reference to the solicitation policy, I find that they are sufficient to put the Respondent on notice that its policy regarding the posting of union materials on bulletin boards was to be litigated in this case. Section 102.15 of the Board's Rules and Regulations requires only that a complaint contain "a clear and concise description of the acts which are claimed to constitute unfair labor practices, including where known, the approximate dates and places of such acts and the names of respondent's agents or their representatives by whom committed." See also *Artesia Ready Mix Concrete, Inc.,* 339 NLRB 1224, 1226–1227 (2003)

[22] Penn first contacted Emily Bowman, at times referred to in the record as Emily Rankin, by a fax dated January 23, 2013, regarding a written warning that Penn received on December 20, 2012 (GC Exh. 16). Penn also sent a fax dated March 21, 2013, to Bowman in which Penn mentioned posting union materials on bulletin boards at the hospital (GC Exh. 113). Based on the March 21, 2013 fax, I find that Penn's telephone conversation with Bowman regarding the posting of union materials on bulletin boards occurred shortly after March 21, 2013.

employed at the Respondent's Montefiore building for several years as an environmental services employee. The environmental services office in the Montefiore building is located on the third floor. According to Berry, in early 2013 there were two bulletin boards located at each side of the entrance to the departmental office that were generally used to post employee schedules and other departmental matters. Across the hall from the office three or four additional bulletin boards were located that often had nothing posted on them.

In early 2013 Berry observed the bulletin boards across the hallway from the office door in the Montefiore building contained postings for the ESS employee council regarding bake sales and other fundraising events that the ESS employee council was sponsoring. These bulletin boards also contain notices regarding the meetings of the ESS employee council. Berry also observed on one of the bulletin boards located next to the door to the department office in the Montefiore building a posting under the heading "UPMC Employee Council" that contained the picture and information regarding the employee of the month for a 5 or 6 month period. (Tr. 675–678; GC Exh. 197.)

Berry further testified that since he began to support the Union in 2011 he posted union related material on the bulletin boards across from the environmental services department office in the Montefiore building. His union postings would be taken down but he did not observe who removed them. In early February 2013, the day after Berry became aware of the settlement in *UPMC I*, he discussed his right to post union related literature on the bulletin boards with department manager Gasparovic. According to Berry's uncontradicted testimony, he told Gasparovic that he understood that he would have the right to post union literature wherever the Respondent posted literature in the hospital. Gasparovic told Berry that he had heard about the settlement but was not sure about Berry being able to post union literature and would get back to him regarding that issue. Approximately 2 days later Gasparovic called him and told him that he would not be able to post union literature on the bulletin boards as they were for department use only.

As I noted above in this section of the decision dealing with the ESS employee council, from approximately January 2013 through May 2013, the Respondent permitted employees to have bake sales outside of the department office in order to raise money for the ESS employee council's Memorial Day picnic. The Respondent also permitted the ESS employee council to conduct candy sales in a management office. Finally, the Respondent permitted employees to post flyers regarding the Memorial Day picnic throughout the hospital. In addition in early 2013, the Respondent permitted employees associated with the ESS employee council to post notices regarding the meetings held by the ESS employee council. Pursuant to the request of the ESS employee council the Respondent furnished it with bulletin boards which the ESS employee council used to communicate with environmental services employees about what it viewed as appropriate procedures to be used by employees in performing their work. Finally, the Respondent permitted the ESS employee council to use the departmental bulletin boards to publicize the employee of the month for at least 5 or 6 months. As I found above, the ESS Employee Council is a labor organization that the Respondent established and assisted in violation of Section 8(a)(2) and (1) of the Act.

Current employee Charles Patterson works as a medical procedure unit (MPU) technician in the GI lab at Presbyterian hospital. Until May 2013, Betsy Yetiskul was the unit director at the GI lab/MTU. Patterson is an open supporter of the Union and has distributed flyers to employees at the hospital and posted union flyers on bulletin boards in the MPU department. According to Patterson's credited testimony, at the beginning of 2013 there were two bulletin boards in the MPU department. One bulletin board was located behind a desk near the nurses' station in the MPU unit. The other bulletin board was located in the employee break room, which Patterson also referred to as the employee locker room. Patterson described the break room as having three tables and a TV hanging on the wall. This room also contains what Patterson referred to as the kitchen area which contained two refrigerators, a microwave, and a vending machine. Behind this area there were approximately 45 employee lockers. The bulletin board was located in the kitchen area near the refrigerator.

Patterson credibly testified that prior to February 2013, he had seen nonhospital related material posted on both bulletin boards. With respect to the bulletin board that was located behind the desk in the MPU unit, Patterson had observed jokes posted on it that employees had sent through the Respondent's email system. With respect to the bulletin board in the employee break room, in the February/March 2013 period, Patterson recalled seeing postings regarding a bowling party and an employee selling Pittsburgh Steelers tickets. Patterson's testimony regarding the bulletin board located in the break room is corroborated by a photo of that bulletin board reflecting the items that he mentioned; it also depicts restaurant menus and a flyer for "American Discount Uniform." (GC Exh. 47.)

On February 7, 2013, at approximately 8:33 a.m. Patterson posted a union flyer on the bulletin board that was located behind the desk in the MPU unit. Shortly afterwards Patterson was working at that desk when Betsy Yetiskul, the unit director, took the union flyer from the bulletin board. Patterson then posted another flyer which Yetiskul promptly removed. This process of Harrison posting the union flyer on the bulletin board and Yetisku removing it occurred a total of approximately 6 times until about 1:40p.m.. During this entire period, neither Patterson nor Yetiskul spoke to each other about what they were doing. According to Patterson there were jokes posted on the bulletin board that day that Yetiskul did not remove Patterson also recalled that Yetiskul did not remove a flyer that she had placed on the bulletin board regarding the sale of daffodils.

At some point after the February 7 incident, another employee in the MPU Department, Jose O'Neill, took down the bulletin board that was located behind the desk in the MPU unit. Patterson was present when this occurred and when he asked O'Neill what he was doing, O'Neill replied that Yetiskul had instructed him to take the bulletin board down. Patterson's testimony regarding this incident is unrebutted as Yetiskul did not testify at the hearing.[23]

[23] Patterson's testimony as a whole makes it clear that the bulletin board that was removed was the one behind the desk in the MPU de-

In support of the complaint allegations regarding the Respondent's alleged disparate application of its bulletin board policy, the General Counsel contends that the Respondent maintained bulletin boards that were available for employee use, but prohibited the posting of union literature on those boards. Relying on cases such as *Bon Harbor Nursing and Rehabilitation Center*, 348 NLRB 1062, 1065 fn. 4 (2006); *Holly Farms Corp*., 311 NLRB, 273, 274 (1993), enfd. 48 F.3d 1364 Cir. (1995)); and *Honeywell, Inc*., 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983), the General Counsel acknowledges that there is no statutory right for employees to use an employer's bulletin boards but contends that the Respondent cannot discriminatorily prohibit employees from posting union notices on bulletin boards that are available for general use by employees. The Union's argument in support of these complaint allegations is similar to that of the General Counsel.

The Respondent contends that it did not enforce its bulletin board policy discriminatorily pursuant to the standards set forth by the Board in *Register Guard*, 351 NLRB 1110 (2007), enfd. in relevant part and remanded, 571 F. 3d 53 D.C. Cir.(2009)) (Register Guard *I*).

In *Register Guard* the Board reiterated its well-established rule that there is no statutory right of employees or a union to use an employer's bulletin board, equipment or media as long as the restrictions are nondiscriminatory. 351 NLRB at 1114. In its decision in *Register Guard I*, the Board also set forth a new analysis regarding the manner in which it would determine whether an employer discriminated against employees who attempted to utilize its equipment, including the email system and bulletin boards, in support of a union. In its decision the Board adopted the analysis of the Seventh Circuit in *Fleming Co.,* 336 NLRB 192 (2001), enf. denied 349 F. 3d 968 (7th Cir. 2003), and *Guardian Industries*, 313 NLRB 1275 (1994), enf. denied 49 F.3d 317 (7th Cir. 1995).

In *Register Guard I* the Board stated:

> We find the Seventh Circuit's analysis, rather than existing Board precedent, better reflects the principle that discrimination means the unequal treatment of equals. Thus, in order to be unlawful, discrimination must be along Section 7 lines. In other words, unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status.
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> . . . .
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> For example, an employer clearly will violate the Act if it permitted employees to use email to solicit for one union but not another, or if it permitted solicitation by antiunion employees but not by prounion employees. Id. at 1117–1118 (footnote omitted).

In its supplemental decision after remand from the D.C Court of Appeals, *Register Guard,* 357 NLRB 187 (2011) (*Register Guard II*) the Board reiterated the new standard regarding discrimination that it set forth in *Register Guard I*, supra. slip op. at 2. The Board also noted in *Register Guard II* that, in contrast, under pre-*Register Guard I* precedent, discriminatory enforcement of rules governing the use of an employer's equipment or other resources consisted of allowing employees to use that equipment for nonwork related purposes while prohibiting its use for Section 7 related purposes. In *Register Guard II* the Board specifically noted that no party had asked it to revisit this issue. 357 NLRB 188 fn. 7. Accordingly, the principles set forth in *Register Guard I* represents existing Board law on the matter and I shall apply those principles in deciding this issue in the instant case. Applying the Board's rationale in *Register Guard I,* the substantial amount of evidence introduced by the General Counsel and the Union regarding the rental of homes, the sale of sports tickets, and other personal postings placed on the bulletin boards by individual employees is of no relevance in determining whether the Respondent discriminatorily prohibited the posting of union materials on its bulletin boards.

What is relevant is the Respondent's conduct in permitting the ESS employee council's use of its bulletin boards. As set forth in detail above, employees were permitted to post flyers on behalf of the ESS employee council regarding the Memorial Day picnic throughout the hospital for months preceding that event. In addition, in early 2013 the Respondent permitted employees associated with the ESS employee council to post notices regarding the meetings held by the employee council. Pursuant to the request of the ESS employee council, the Respondent furnished to the ESS employee council with bulletin boards which it used to communicate with employees about what it viewed as appropriate procedures to be used by environmental services employees in performing their job. Finally, the Respondent permitted the ESS employee council to use departmental bulletin boards to publicize the employee of the month award for at least 5 or 6 months. As I have found above, the ESS employee council is a labor organization that the Respondent initiated, dominated, and unlawfully assisted in violation of Section 8(a)(2) and (1) of the Act.

The Respondent permitted the frequent use of its bulletin boards by the ESS employee council during this same period that Touray and Loveridge informed Lewis in February 2013 that he could not post literature on the Respondent's bulletin boards and when Bowmann informed Penn in March 2013 that she was not permitted to post union material on the Respondent's bulletin boards. Although not alleged to be unfair labor practices in the complaint, the Respondent also refused to permit Berry to post union materials on bulletin boards and the Respondent supervisor Yetiskul repeatedly took down union material posted on a bulletin board by Patterson.

It is clear that the Respondent permitted the use of its bulletin boards by employees to solicit interest in, and funds to support, the ESS employee council, an unlawfully assisted labor organization. At the same time, the Responded refused to allow the employees supporting the Union to post materials on bulletin boards in support of the Union. Thus, based on the principles set forth in *Register Guard I,* the Respondent has drawn a line between permitted and prohibited activities on Section 7

partment and that this occurred after the February 7 incident. Thus, I find that the portion of his direct testimony that indicates that O'Neill informed Patterson that Yetiskul had instructed O'Neill to take down the bulletin board in the locker room in January 2013 is incorrect and I do not credit it.

grounds and has discriminatorily applied its bulletin board policy and thereby violated Section 8(a)(1) of the Act by informing employees that they could not post union materials on bulletin boards.

Paragraph 33 alleges that the Respondent, by Betsy Yetiskul, on May 14, 2013, disparately enforced the above noted solicitation rule by permitting employees to solicit in patient care areas for purposes not related to Respondent-sponsored matters, while prohibiting its employees from soliciting in patient care areas in support of the Union.[24]

Patterson also testified regarding this complaint allegation. According to Patterson, on May 14, 2013, the Pennsylvania lottery jackpot was over $250 million and employees in the MPU unit were discussing buying lottery tickets. Patterson was at the nurses' station in the MPU unit when Eileen Massof, a RN in the MPU unit, approached him and asked him if he wanted to play the lottery. Patterson indicated that he did and gave Massof $2 to participate in a lottery pool. Massof also went to other employees and asked them if they want to participate in lottery pool. At the end of the day Massof gave the participating employees the ticket numbers she had purchased.

According to Patterson, there was no winning ticket in the lottery on May 14 so that the lottery jackpot was even larger on May 16. On that date, Massof again went around and asked employees if they want to participate in a lottery pool and collected money from them if they did. Patterson was in the post-recovery area, a patient care area, when Massof approached him and Patterson again gave Massof $2 in order to participate in the lottery pool. Patterson also observed Massof asking other employees to participate in collecting money from employees at the nurse's station. Later that morning, Patterson was talking to Massof when Yetiskul approach them. Massof asked Yetiskul if employees could play the lottery and Yetiskul replied that they could play "among their clique" but not to post anything on the bulletin board.

Masoff testified on behalf of the Respondent pursuant to a subpoena. Massof recalled that the Pennsylvania lottery had a large jackpot in May 2013. According to Massof, she was at her work station before starting work that day, when she stated to employees in the area that there was a large lottery pool and asked if everybody had heard about it. Massof further stated that she was going to buy tickets for herself when some of the employees in the area then asked her if they could go in with her. According to Massof, employees then approached her and gave her money in order to participate. Massof purchase 11 tickets altogether and wrote down on the list the names of the employees who participated. She also made copies of the tickets purchased but she did not recall distributing those copies to the participating employees. She testified that someone else may have. Massof testified that no supervisors participated in the lottery pool and that none were present when she spoke to other employees about it. Massof specifically denied having a conversation with Yetiskul about playing the lottery. Massof did not recall speaking to other employees about another lottery drawing later that same week.

To the extent there is conflict between the testimony of Patterson and Massof, I credit Patterson. His testimony on this issue is straightforward and his demeanor reflected certainty regarding the events he was testifying about. In addition, Patterson is a current employee with no personal stake in the outcome of this proceeding. As a current employee who testified against the interest of his employer, it is unlikely that his testimony is false. *Bloomington-Normal Seating Co*., 339 NLRB 191, 193 (2003). Massof's demeanor while testifying reflected some uncertainty with regard to these events and on cross-examination she admitted she did not recall much of the details of what occurred. (Tr. 2799.)

Based on Patterson's credited testimony, I find that on May 14 and 16, 2013, in patient care areas, Massof spoke to employees about playing the Pennsylvania lottery and collected money from the employees who indicate a desire to participate. When Massof asked Yetiskul if it was okay for employees to play lottery, Yetiskul indicated that they could play but they were not to post anything on the bulletin board.

While the credited evidence establishes that the Respondent, through Yetiskul permitted employees to solicit for the lottery in patient care areas on or about May 14, 2013, there is no evidence that the Yetiskul prohibited employees from soliciting on behalf of the Union on or about the date as alleged in paragraph 33 of the complaint. Accordingly, I shall dismiss that complaint allegation.

Independent Allegations of Violations of Section 8(a)(1) of the Act

Paragraphs 17 and 18 of the complaint allege that the Respondent by John Burns, and/or William Dilla and/or Dan Gasparovic interrogated employees and threatened employees with discipline unless they agreed to write a statement regarding their union activities.

As noted above, Franklin Lavelle and Ronald Oakes werereinstated pursuant to the settlement in UPMC I on February 25, 2013. As will be discussed more fully below, on February 28, 2013, Leslie Poston sent an email message to a substantial number of the Respondent's employees welcoming Oakes and Lavelle back to work following their reinstatement. During the Respondent's investigation of Poston's email message, the Respondent met with Lavelle and questioned him about his involvement in the sending of the message.

The only evidence in support of this allegation is a document signed by Gasparovic and Dilla dated March 1, 2013 (GC Exh. 148). This document states:

At approximately 3:45 PM on Friday, March 1, 2013, I had called Frank Lavelle down to the office with William Dilla present. I informed Mr. Lavelle that human resources is conducting an investigation and that I had a few questions for him to answer.

1. I asked Mr. Lavelle if he instructed Leslie Poston to post or email the letter.

[24] Pars. 28, 31, and 32 of the complaint allege that the Respondent applied the rule for disciplinary purposes only against employees who support the Union. These allegations will be addressed later in this decision in the discussion of the complaint allegations that the Respondent violated Sec. 8 (a)(3) and (1) in disciplining certain employees.

> 2. I asked Mr. Lavelle if he gave the letter to Leslie.
>
> 3. I asked Mr. Lavelle he wrote the letter, and if it was not him, who wrote the letter.
>
> Mr. Lavelle said that he had no comment and was not writing a statement. I said to him that he could have until Monday to write it. Mr. Lavelle again said he had no comment.
>
> I then instructed that the line of questioning as part of an investigation conducted by human resources and if he fails to cooperate that he will be subjected to disciplinary action up to and including termination.
>
> Mr. Lavelle then said he had no comment and was not writing a statement.

In *Scheid Electric*, 355 NLRB 160, 161 (2010), the Board indicated in deciding whether the questioning of an employee violate Section 8(a)(1) it determines:

> {w}hether under all the circumstances the interrogation [of an employee] reasonably tends to restrain, coerce or interfere with rights guaranteed by the Act." *Bloomfield Health Care Ctr.,* 352 NLRB 252 (2008), quoting *Rossmore House,* 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom. *HERE 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Among the factors that may be considered in making such an analysis are the identity of the questioner, the place, and method of the interrogation, the background of the questioning and the nature of the information sought, and whether the employee is an open union supporter.

In *Intertape Polymer Corp.,* 360 NLRB 957 (2014), the Board also applied the above noted factors in finding the questioning of an employee to be an unlawful interrogation

Applying the factors set forth by the Board in *Scheid Electric*, *Intertape Polymer* and *Rossmore House*, I find that Gasparovic's questioning of Lavelle regarding this incident constituted an unlawful interrogation regarding his union activities in violation of Section 8(a)(1) of the Act. In this regard, the Respondent has demonstrated hostility to the Union's attempt to organize its employees. I find that the questions directed to Lavelle by Gasparovic regarding who wrote the email that Poston sent to employees and what, if any, role Lavelle had in instructing Poston to send it, is not a legitimate area of inquiry regarding the question of whether Poston used the Respondent's email system in violation of its policy in transmitting the email. In addition, Gasparovic was the manager of the environmental services department and summoned Lavelle to his office for the interrogation, which was conducted in the presence of another manager, Dilla. Finally, Gasparovic's threat that Lavelle could be terminated for refusing to answer his questions adds to the coercive nature of the interrogation. The fact that Lavelle was in open union supporter does not privilege the Respondent to interrogate him in such a coercive fashion Under the circumstances, I also find Gasparovic's threat to discipline Lavelle for refusing to participate in an unlawful interrogation is also a violation of Section 8(a)(1) of the Act.

Paragraph 20 of the complaint alleges that the Respondent, by Jason Hogan, at Shadyside Hospital impliedly threatened employees with a poor evaluation if they continued their support for the Union.

Former employee Jynella Everett testified on behalf of the General Counsel regarding this allegation. Everett began working for the Respondent at Shadyside Hospital as a housekeeper in October 2012 and resigned from her employment with the Respondent in July 2013. While she was employed by the Respondent her immediate supervisor was Jason Hogan. In March, 2013 Everett wore, for the first time, a badge pull given to her by the Union which stated: "Can't Stop Us Now." (GC Exh. 95.) Everett was walking down a hallway the basement of Shadyside Hospital, a nonpatient care area, with another employee when Hogan stopped her and asked her if she knew her evaluation was coming up. Everett replied, "Yes, I do." Hogan looked down at her badge pull and said, "Okay. I'm just letting you know your evaluation is coming up." Everett replied that she knew that already. The conversation then ended. After her conversation with Hogan, Everett took the union badge pull off but later that day "put it back on because I did not want him to stop me from wearing it." (Tr. 1395.) However, Everett did not wear the union badge pull the next day and did not wear any union insignia until shortly before she resigned her employment.

Hogan testified that he recalls giving Everett a performance evaluation in March 2013. Hogan recall discussing Everett's upcoming evaluation with her on one occasion a few weeks prior to giving her the evaluation. According to Hogan, he received a call asking for a restroom cleanup and assigned Everett that task of cleaning a restroom. Everett later reported to him that restroom had been "really, really bad." Hogan apologized and told Everett that he did not know what condition the restroom was in when he assigned for the task of cleaning it up. He gave Everett two meal tickets and informed her that he would include her performance on that day in her evaluation. Hogan recalled that Everett was wearing her regular housekeeping uniform on this occasion and he did not observe her wearing anything to show support for the Union. He specifically denied seeing Everett wear a badge pull with the legend "Can't Stop's Now."

The evaluation that Hogan gave Everett is dated March 27, 2013. In this evaluation Hogan commented favorably on Everett's performance in cleaning a restroom. (R. Exh. 388, p. 4.)

I credit Everett's testimony regarding Hogan's actions on the first day that she wore her Union badge pull. Everett's demeanor while testifying demonstrated certainty regarding her encounter with Hogan. While the encounter was brief, Everett's testimony indicated a vivid recollection of the event. I do not credit Hogan's denial that he ever observed Everett wearing a badge pull with the commonly known Union phrase "Can't Stop Us Now" on it as I do not find it convincing. I do not doubt that Hogan told Everett that he would comment favorably on her evaluation regarding her performance in cleaning the restroom but I find that he was describing a different conversation than the one that Everett testified about.

Based on Everett's credited testimony, I find that, under all the circumstances, Hogan's comments to Everett constituted an implied threat that her union activities could adversely affect her upcoming appraisal in violation of Section 8(a)(1) of the Act. I find that Hogan's repeated statements regarding Everett's

upcoming evaluation while looking at her union badge pull had a tendency to interfere with Everett's protected right to display union insignia. In making this finding, I specifically note that Hogan's comments were made in the context of the Respondent committing a substantial number of other unfair labor practices.

The Alleged Violations of Section 8(a)(3), (4), and (1) and Related Independent Alleged Violations of Section 8(a)(1) of the Act

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Board established a framework for deciding cases turning on employer motivation regarding an adverse employment action taken against an employee. To prove an employer's action is discriminatorily motivated and violative of the Act, the General Counsel must first establish, by a preponderance of the evidence, an employee's protected conduct was a motivating factor in the employer's decision. The elements commonly required to support such a showing are union activity by the employee, employer knowledge of the activity and antiunion animus on the part of the employer. If the General Counsel is able to establish a prima facie case of discriminatory motivation, the burden of persuasion shifts "to the employer to demonstrate the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra, at 1089. Accord: *Mesker Door, Inc.*, 357 NLRB 591, 592 (2011). In the instant case, I will apply the Board's *Wright Line* doctrine in deciding the 8(a)(4), 3), and (1) allegations in the complaint, except for the allegations in the complaint regarding the suspension and final written warning given to Leslie Poston and the final written warning given to Chaney Lewis.

An employee's union activity and/or involvement with Board processes and the Respondent's knowledge of that activity varies from one employee to another and will be set forth in detail herein. It is clear, however, that the Respondent opposes the unionization of its nonclinical support employees. This animus to the union activities of its employees is primarily established by the violations of the Act that I find it committed herein. The Respondent's opposition to the Union's organizing campaign expressed on its internal website is also indicative of animus. The Board has noted that an employer's antiunion campaign literature, although not itself unlawful, can be considered as further evidence of animus. *Embassy Vacation Resorts*, 340 NLRB 846, 849 fn. 15 (2003); *Overnite Transportation. Co*., 335 NLRB 372, 375 fn. 15 (2001) Thus, the record as a whole clearly establishes that the Respondent possesses antiunion animus.

The December 20, 2012, Written Warning issued to Felicia Penn and Related 8(a)(1) Allegation

Paragraphs 36, 48, and 53 of the complaint allege that about December 20, 2012, the Respondent issued a final written warning to employee Felicia Penn in violation of Section 8 (a)(3) and (1).

Penn's Union Activity

Current employee Felicia Penn testified in support of these allegations. Penn began working for the Respondent at Presbyterian hospital in approximately 2004 as an anesthesia technician in the operating room. Jane Hackett was her direct supervisor until October 2013. During the same period, Amy Bush the Respondent's then director of surgical services, was Penn's department manager, and the human resources representatives assigned to Penn's department included Kathy Grills and Emily Bowman.

Penn is an open union supporter. While her testimony is somewhat lacking in detail, Penn testified that she had been discussing the Union at work for substantial period of time and made reference to having been engaged in open union activity "since Frank Lavelle was terminated." (Tr. 471.) The record does not contain the date of Lavelle's termination, but he was reinstated pursuant to the settlement agreement in Case 8–CA–081896, which was executed on February 7, 2013. According to Judge Goldman's decision noted above, the original complaint in 06–CA–081896 issued on December 13, 2012. (JD–28–13, slip op. at 2.) Thus, it is clear that Lavelle's discharge occurred several months prior to December 13, 2012.

Penn also spoke to employees about supporting the Union on breaks in the anesthesia technicians' "work room" and outside the work room in November 2012. (Tr. 505–506.) The work room contains supplies and a computer. The room also contains a table and a bulletin board. Anesthesia technicians take breaks in that room, which is also used by supervisors. The work room is inside the Presbyterian Hospital's operating room area.

According to Penn's credited testimony, employees posted a number of personal items on the bulletin board in the anesthesia technicians work room such as information regarding the rental of homes and the sale of cookies. Penn testified that she was posting information regarding the Union on the bulletin board in the work room in November 2012. (Tr. 505–506.) She further testified at these items were taken down by the time she returned to work the next day. Penn testified that she would then repost the union materials.

According to Penn's uncontradicted testimony, Hackett was present, at times, when Penn posted union material on the bulletin board and spoke to employees about the Union (Tr. 506–507.)[25] It is therefore that clear that prior to Penn's final written warning issued on December 20, 2012, she had been engaged in open union activity at work and that Hackett had knowledge of her union support in November 2012.

Hackett's office was located directly across from the work room. Penn testified that, sometime in the first part of 2013, Penn was in Hackett's office when Hackett asked her why she was monitoring two phones for other technicians. Penn replied that she was "holding their phones" so they could take a lunch break. Hackett asked how Penn could give other employees an adequate lunch period if she was monitoring two phones at one time. Penn replied that this was a regular practice and that if she needed help she could get help from another employee. Hackett then told Penn that she "was well aware of what had been going on as she has heard her talking about the union" and that she knew exactly what Penn was doing. (Tr. 469.) Penn indicated that Hackett was present in the lunch room earlier that day when Penn was discussing the Union.

[25] Hackett did not testify at the trial.

Sometime in March 2013 Penn began to wear a lanyard with the Union's logo that stated "CAN'T STOP US NOW" (GC Exh. 94) and that Hackett had observed her on several occasions while she was wearing the union lanyard. Penn also testified that Hackett told her in approximately June 2013 that she knew Penn was distributing information to other employees. Hackett then told Penn that she knew what Penn was doing on her breaks and that Penn did not have time for that.

As noted in detail above, in March 2013, a human resources representative for the Respondent, Emily Bowman, told Penn that she was not allowed to post anything to do with the Union on the bulletin boards at work in violation of Section 8(a)(1) of the Act.

Penn's December 20, 2012 Final Written Warning

Facts

Anesthesia technicians have a wide variety of responsibilities including setting up operating rooms for anesthesia and assisting an anesthesiologist throughout surgical cases including organ transplants and traumatic injuries. The Respondent operates a level 1 trauma center and the anesthesia technologist team handles approximately 80 to 110 surgical cases a day.

The anesthesia technicians schedule is designed to accommodate the anticipated surgical volume. In this connection, the number of anesthesia technicians on duty increases from the early morning to mid day, when staffing is at its peak, then gradually is reduced during the afternoon and into the evening. Only two anesthesia technologists are scheduled to work overnight.

On each shift one anesthesia technician is designated by an asterisk on the schedule, which signifies they are scheduled for overtime. While technicians are scheduled to come in at night if additional help is needed, the designated overtime technician is required to stay over and provide additional help for the next shift if the volume of work requires it. If no lead anesthesia technician is present, the most senior technician takes on the role of "charge technician." The duties of the charge technician include carrying the "charge phone" used to communicate with the other anesthesia technicians, the anesthesiologist in charge and the nurse in charge. The charge technician also has the responsibility to ensure proper and adequate staffing coverage and giving a report to the next person taking charge regarding any outstanding issues or staff changes that have occurred.

On November 28, 2012, Penn clocked in for her shift at 10:34 a.m. and worked until 7:04 p.m. (R. Exh. 272.) Anesthesia technician Aleasha Curtaccio was also working on the same shift as Penn. When Hackett left at approximately 4 p.m., as the most senior person on the shift, Penn became the charge technician. Penn was also the designated overtime technician on the schedule. Prior to Hackett leaving, she discussed the assignment of overtime with Penn and because the operating room was busy, Hackett approved the assignment of overtime. While Hackett was still at work, Penn called Mikeia Davenport, who was scheduled to begin work at 10:30 p.m. and asked her to come in early for overtime. Davenport agreed to come in early for overtime. The assigned, overnight call person was Andrea Davis (formerly known as Andrea Henry). The overnight call person is responsible for coming in at any time from 10:30 p.m. to 7 a.m. if there is too much work for the two night-shift technicians and they need assistance.

The only two witnesses who testified regarding the events of November 28 who were present at the hospital that evening were Penn and Curtaccio, a current employee who testified on behalf of the Respondent. To the extent their testimony conflicts, I credit Curtaccio as her testimony was thorough and detailed and consistent on both direct and cross-examination. In addition, her demeanor was impressive in that she exhibited certainty when testifying about the events of that evening. On the other hand, Penn's testimony was, at times, vague and somewhat generalized. Most importantly, however, her testimony conflicts with objective evidence on an important point. Penn testified that she did, in fact, work overtime on the evening of November 28 until 8 p.m. The Respondent's payroll record for that day, however, clearly establishes that Penn clocked out at 7:04 p.m. after working for 8 hours. (R. Exh. 272, p. 10.) Accordingly, I have determined that Curtaccio's account of the events of that evening is more reliable than that of Penn.

According to Curtaccio's credited testimony, she had agreed with Davis to cover the on-call responsibility for that night. Accordingly, starting at 10:30 p.m., Curtaccio was subject to being called back in to work if necessary.

On November 28 at 7 p.m. there was a heart transplant in progress and there were additional transplants pending, two in the Montefiore building and two at Presbyterian. As noted above, at 7:04 p.m. Penn clocked out after giving the charge telephone to technician Ronda Kastle, who then took over as the charge technician. At the end of her scheduled shift at approximately 7 p.m., Curtaccio met Kastle in the work room and Kastle informed Curtaccio that Penn had left. Curtaccio and Kastle discussed the workload and discussed what was still needed to be done. Curtaccio felt it was too busy for Kastle and Abe Young, the other anesthesia technician who was present at Presbyterian, to handle the workload. At that time anesthesia technician Todd Drelick was also still on duty at Montefiore. Curtaccio told Kastle that she would help set up for the two transplants that were still pending but that she was going to call Hackett to make sure she was allowed to stay because she was not the designated overtime person and was the on-call person.

At approximately 7:15 p.m., Curtaccio called Hackett and received permission to stay. At approximately 7:45 p.m. Curtaccio saw Davenport in the locker room and reported to her regarding the pending workload and then Curtaccio clocked out at 8 p.m. At approximately 10:20 p.m., Kastle called Curtaccio and told her that the transplants had been canceled and that it would not be necessary for her to come in.

On November 30, 2012, Hackett spoke to Penn about the events of November 28, in the employee locker room. Hackett asked Penn why she not stayed overtime on November 28, as she was the overtime person. Penn testified that she told Hackett that she did stay for overtime and that Penn had initiated the phone call Curtaccio had with Hackett as Penn was still at work when a call was made.[26] Penn also stated that the problem was

[26] While Penn was scheduled to work from 9:30 a.m.to 6 p.m. on November 28 (R. Exh. 272) she actually began work at 10:34 a.m.and

that they did not have a call person that night and Hackett was mistaken about what Curtaccio's phone call meant. Hackett told Penn that if she wanted to discuss it more she could meet her in Amy Bush's office.

Penn testified that when Hackett, Bush and Penn met later that day in Bush's office, Bush told Penn that she was not a team player and that she engaged in job abandonment when she left work when her team still needed her. Penn told Bush that she performed her duties and that a call person was in place but did not have to be used so that there was no actual problem that evening. Bush responded she would be in contact with human resources because Penn had abandoned her job.

Bush testified that on November 30 prior to the meeting she held with Hackett and Penn, Hackett reported to her that Penn had spoken to Hackett in an inappropriate way in the locker room, using curse words. Hackett also reported that Penn had left work early when she knew there was a potential for more surgical cases but that she had to attend to her children. Hackett also informed Bush that Penn had stated she was not going to work on Christmas even though she was on the schedule.

There is some conflict between the testimony of Penn and Bush regarding what was discussed at the November 30 meeting. Bush testified that at the meeting with Penn and Hackett held in Bush's office, she told Penn that it was inappropriate for her to be using such language with Hackett. She also said that as a charge technician she had to make sure that the technicians and patients were taken care of and that she could not leave until the extent of the pending transplants were known and that the work was finished. she also told Penn that Christmas was her scheduled holiday to work and that unless she could switch with another employee this was her holiday to work.

I credit Bush's testimony regarding the meeting held with Hackett and Penn with respect to the topics that were discussed at that meeting, as the Respondent's later investigation into the incident on November 28 supports Bush's testimony on this point. However, I credit Penn's testimony that Bush accused her of "job abandonment." My finding on this point is supported by the fact that on December 5, 2012, Bush sent an email to Hackett and human resources representative Grills stating, in part: "Felicia was insubordinate by telling Jane she would not work her scheduled-she spoke in loud voice. She also abandoned her job and responsibilities by leaving work prior to work being completed. Please get statement from Felicia and with Kathy's permission, let's move forward with termination." (GC Exh. 134.)

After the meeting on November 30, an investigation was conducted by the Respondent regarding Penn's conduct on November 28 and 30. Penn and Hackett furnished statements as did anesthesia technicians Curtaccio and Davenport.

Hackett's statement dated December 5 (GC Exh. 133) was submitted to Bush and Grills. Hackett statement indicates that when she spoke to Penn on Friday, November 30, Penn told her that that she would not be working on Christmas even though it was scheduled because of family issues. Penn asked Hackett if they can work something out since she would not be able to work and Hackett told her that they would discuss it later. Hackett then asked Penn about the events of November 28. Hackett's statement referred to the phone call that she had received from another staff member who indicated Penn was the designated lead person and left at 7 p.m. with a busy schedule and work still to be done. Hackett told Penn "the lead person and especially one in charge, needs to stay until the work is done and all cases are covered. So she needed to stay until all that was accomplished." Hackett statement then indicated that Penn indicated in a loud voice that she did stay late until 7 p.m. Hackett's statement also indicated that Penn said, "I have a lot going on at my home and with my family and I just can't stay any later." Hackett's statement further indicates "Felicia uses inappropriate language in everyday speech and this encounter was no exception."

As noted above, on December 5, Bush sent an email to Hackett and Grills, the human resources representative indicating she wanted to terminate Penn because of abandoning her job and for being insubordinate. Bush sent this email before obtaining a statement from Penn or other employees regarding the events of November 28.

Penn's statement (R. Exh. 263) is dated December 6, and states in relevant part, that she had worked until 7 p.m. on November 28 and before she left, she made sure that things were under control and personally spoke to everyone before she left making sure it was okay for her to leave. Penn's statement also indicates that the last person she spoke to was Curtaccio and that she specifically asked her if she had spoken with the call person, Andrea Henry (Davis). Penn's statement indicated that Curtaccio told her she had not spoken to Davis and if she needed would take the call for Davis but for the time being she would stay and help out. Penn's statement indicates said she informed Hackett in their meeting on November 30 that when Penn left it was not busy. Penn statement also indicated, "it had the potential to be a disaster if all four transplants went that were booked and the only issue I was aware of was we could not contact the call person."

Curtaccio's statement dated December 11 (GC Exh. 123) was submitted to Hackett and indicates:

> You requested a statement for the evening of 11/28/12. I called you that evening to see what I should do. When we spoke, I told you of the multiple transplants that were scheduled at PUH/MUH that night with multiple donors. One donor in OR at 8:40 pm. Abe I set up for two of the PUH transplants while Felicia [Penn] started a transplant in OR 6. Todd was at MUH waiting to hear of the two transplants that were pending there. With other rooms coming out and going inand being short staffed, Felicia was the overtime person and had to stay. And she did until 7:00pm. At7:00 pm, it had slowed down case wise but there was a lot cleanup/set up to be done and if I would have left it would have only been Rhonda and Abe (Keia was on her way in). I stayed until 8:00 pm until I knew Keia was coming and after talking to you. I then left in case I needed to take Andrea's call which started at 10:30 pm, and come back in. The transplants ended up canceling around

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punched out at 7:04 p.m. that evening. (R. Exh. 272, p. 10.) Thus Penn did not actually work overtime that evening. In addition, as noted above, I find that Curtaccio called Hackett after Penn had left work that evening and thus Penn's testimony on this point is not credible.

> 10:30 pm and Rhonda contacted me to let me know I didn't need to come in.

Davenport's statement dated December 11 (GC Exh. 121) states:

> I am writing this email on behalf of Felicia regarding the situation that arisen (sic) on wed. nov 28, I did not feel that Felicia abandoned us. I was under the impression that things were to be a bit busy so I came in early that evening at 7:30 pm. When I came in Aleasha [Curtaccio] was in the locker room preparing and to leave. She informed me of the transplants that were scheduled for later on that evening and stated that everything had already been set up for them. So when I went into the work room Rhonda and Abe both had no more than 2 rooms each and I was able to set up the entire OR for the next day. Halfway through setting up the OR we were informed that all the transplants had been canceled but one and that was a kidney-panc to go in at 4:30 AM. I was not under any sort of distress by Felicia leaving early and did not feel the need for her or Aleasha to stay once I had arrived.

After some further emails from Grills asking for further details from Hackett regarding any inappropriate language that Penn used in their November 30 discussion, the Respondent concluded its investigation on December 16.

At that point Hackett drafted the substance of a written warning to Penn. Because Penn had previously received a verbal warning and a written warning under the Respondent's corrective action policy this, was a final written warning. The final written warning, (GC Exh. 114) indicated the following:

> On November 28, 2012, you were the designated layperson. You failed to stay beyond 7 PM to ensure that there was adequate staffing to handle the cases as well as set up for the next day. Instead you gave the charge phone to another employee and left. This is considered work negligence. On November 30, 2012 when I spoke you concerning the incident your behavior and demeanor were inappropriate.

On December 20, 2012, Hackett and Grills met with Penn and gave her the final written warning. Thereafter, Penn filed a grievance under the Respondent's internal grievance procedure that was ultimately denied.

After the final written warning was issued to Penn on December 20, 2012, Hackett failed to forward the signed final written warning notice and the executed disciplinary authorization form to the human resources department to be included in Penn's file. When the Respondent discovered that the signed copies of these documents could not be located, the discipline was rescinded because of the lack of signed copies.

On June 18, 2013, Bush and Emily Bowman, a human resources consultant, met with Penn and Bush and informed Penn that the December 20, 2012 final written warning had been rescinded and would not be used against her. Bush also provided Penn with a letter dated June 14, 2013, indicating that the final written warning was rescinded and would not be used against her in any future corrective actions (GC Exh. 122).

Analysis

Applying the *Wright Line* analysis to Penn's final written warning, it is clear that prior to November 28, 2012, Penn was an open employee advocate for the Union. In this regard, she frequently spoke to other employees in support of the Union at work. She also posted literature in support of the union on bulletin boards in the anesthesia technician break room. I also find that Penn's support for the Union was known to the Respondent by November 28, 2012. In this connection, Penn's uncontradicted testimony, which I credit, establishes that Hackett was present, at times prior to November 28, 2012, when Penn posted union material on the anesthesia technicians' bulletin boards and spoke to employees about the Union. Although both Bush and Grills testified that they were not aware of Penn's support for the Union prior to issuing her a final written warning on December 20, 2012, I do not credit their testimony on this point as I find it to be implausible. It is clear that Hackett, Bush, and Grills had frequent discussions regarding Penn during the period between November 28 and December 20. The record as a whole supports the fact that the Respondent had an intense interest in the Union's organizing campaign and its supporters, and I simply do not believe that Hackett did not relay her knowledge of Penn's support for the Union to Bush and Grills. The Respondent has demonstrated its antiunion animus through the violations of Section 8 (a)(1), (2), (3) and (4) that I find it committed in this case. In addition, I find that the timing of the discipline issued to Penn, shortly after she engaged in open union activity in November 2012, supports an inference that the Respondent's final written warning was motivated by Penn's union activity. *State Plaza Hotel*, 347 NLRB 755, 755–756 (2006); *Toll Mfg. Co*., 341 NLRB 832, 833 (2004). Thus, I find that Penn's final written warning was motivated by her union activity, and the burden of persuasion shifts to the Respondent to demonstrate the same action would have taken place even in the absence of the protected conduct. *Wright Line*, supra, at 1089.

Turning to the Respondent's defense, in its brief the Respondent contends that Penn's final written warning was justified because it was her responsibility to stay and work overtime if additional assistance was needed on the evening of November 28, but instead she clocked out after 8 hours and Curtaccio had to work an extra hour until additional help arrived. The Respondent contends that Penn's conduct constituted work negligence. In assessing the Respondent's defense, I note that the Board has held "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F.Bolin, Co*., 311 NLRB 1118, 1119 (1993), enfd. mem 99 F.3d 1139 (6th Cir. 1996). In order to meet the *Wright Line* burden of persuasion, an employer must establish that it is consistently and evenly applied its disciplinary rules. *DHL Express, Inc*., 360 NLRB 730, 736 (2014). In the instant case, the Respondent has produced no evidence of other employees who have been disciplined for "work negligence" or "inappropriate behavior and demeanor." In light of that, I have only the circumstances surrounding Penn's warning in which to assess the lawfulness of the Respondent's discipline of her. In this regard, the Respondent does not point to any evidence that establishes objective standards regarding what constitutes "work negligence" or

inappropriate demeanor or behavior.

An important factor in assessing the Respondent's defense is that on December 5, before a written statement was obtained from Penn or any other employee with knowledge of the events of November 28, Bush was advocating that Penn be terminated for acting in an insubordinate manner to Hackett on November 30 and abandoning her job on November 28. This advocacy for termination, without an adequate investigation, when coupled with suspicious timing, supports a finding of discriminatory motivation. *Ferguson Enterprises, Inc*., 355 NLRB 1135, 1146 (2010). While Bush's initial recommendation to terminate Penn, without conducting an investigation, was not followed, the evidence revealed in the investigation does not convince me that the Respondent would have taken the same action against Penn in the absence of her protected union activity. As noted above, before Hackett left work on November 28, she knew that Penn had contacted Davenport and that Davenport was going to come in earlier than her scheduled 10:30 p.m. start in order to work overtime. In addition, the witness statements of Curtaccio and Davenport, disinterested employees who were on duty that night, do not support the allegation that Penn engaged in work negligence of November 28 when she left at 7 p.m. As noted above, Davenport's statement reflects that when she arrived at approximately 7:30 p.m., the workload was manageable. While setting up the operating room Davenport was informed that all of the scheduled transplants had been canceled, except one. Davenport indicated that Penn's leaving did not cause her any "distress" and that she did not feel any need for Curtaccio to stay any longer after she had arrived. Curtaccio's statement reflects that by 7 p.m. the caseload had slowed down but there was clean up and set up work to be done and she stayed until 8 p.m.until she knew that Davenport was coming in. The statement further indicates that the transplants were canceled at approximately 10:30 p.m. It thus appears that the fact that Penn left at 7 p.m. had no effect on patient care. The only effect on employees was that Curtaccio and not Penn worked an additional hour. The fact that Curtaccio believed that an additional hour of work was appropriate in order to properly staff the department, and sought the approval of Hackett to do so, does not , in my view, establish that Penn engaged in "work negligence" by leaving at 7 p.m.

With regard to the allegations in the written warning that Penn's behavior toward Hackett was insubordinate on November 30, Hackett's witness report indicates that the language used by Penn on that occasion was the language that she commonly used.

After considering all of the evidence, I conclude that the Respondent has not demonstrated that it would have taken the same action toward Penn in the absence of her protected union activity and accordingly find that the final written warning issued to her on December 20, 2012," violated Section 8(a)(3) and (1) of the Act.

The Alleged 8(a)(1) Violations Directed to Penn

Paragraph 10 of the complaint alleges that about February 14, 2013, the Respondent violated Section 8(a)(1) of the Act, by Jane Hackett, by telling employees it knew what they were discussing, created an impression among its employees that their union activities were under surveillance.

As set forth above, Penn's uncontradicted testimony establishes that during the early part of 2013, Hackett told Penn during the conversation that she "was well aware of what had been going on as she has heard [Penn] talking about the union and that she knew exactly what Penn was doing. This conversation occurred shortly after Hackett was present in the lunch room earlier that day when Penn had been discussing the Union with other employees. In addition, Penn had on several occasions openly posted union materials on the bulletin board in the lunch room when Hackett was present.

In determining whether an employer has created an unlawful impression of surveillance of employees' union activities, the Board considers "whether under all the relevant circumstances reasonable employees would assume from the statements in question that their union or other protected activities had been placed under surveillance." *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1183 (2011); *Frontier Telephone of Rochester, Inc*., 344 NLRB 1270, 1276 (2005), enfd. 181 Fed Appx. 85 (2d Cir. 2006). Applying that test in the instant case, it is clear that Penn openly conducted activities in support of the Union on a number of occasions when Hackett was present. Penn was very open about her support for the Union and took no steps to keep her activities secret. Under the circumstances, I find that Hackett's remark was simply an observation about Penn's union activity which was conducted openly in front of her. Accordingly, I find that, in this context, Hackett statement would not have reasonably caused Penn to conclude that the Respondent was engaged in surveillance of employees' union activities. Accordingly, I find that the Respondent has not violated Section 8(a)(1) as alleged in paragraph 10 of the complaint and I shall dismiss this allegation.

Paragraph 23(b) of the complaint alleges that on or about June 18, 2013, the Respondent, by Amy Bush and Emily Bowman, intimidated and coerced its employees in the exercise of their Section 7 rights by disparaging employees who engaged in protected concerted activities in. violation of Section 8(a)(1) of the Act

Penn testified that at the June 18, 2013, meeting between Penn, Bowman and Bush at which Penn was notified that her December 20, 2012, final written warning was rescinded, Bush told her that the letter was written being rescinded not because of a finding that she was right, but because she "bullied her way through this process." Bush added that Penn's coworkers were afraid of her and that is why they wrote statements on her behalf. According to Penn, she was not given any further information at this meeting about the reason that her final warning was being rescinded.

Bush testified that at the June 18, 2013 meeting with Penn, she informed Penn that the final written warning she received on December 20, 2012, was being rescinded. Bush also testified that she reminded Penn of an unrelated matter regarding her absences and also reminded her that it was important for her to get a report when she came on her shift as well as to give a report when she left her shift. Bush did not deny that she made any statements to Penn regarding her "bulllying" the grievance process or that her coworkers were afraid of her and that is why they wrote statements on her behalf. As noted earlier, Bowman

did not testify at the hearing.

I credit Penn's uncontradicted testimony that Bush told her on June 18, that Penn's December 20 warning was not being rescinded because Penn was right in the matter but rather that she had the grievance process and that coworkers were afraid of her and that is why they wrote statements on her behalf. There is no credible evidence in the record to support such a statement. The Respondent has admitted that the reason for the rescission was the fact that the Respondent could not produce signed copies of the warning in Penn's personnel file. Under the circumstances, I find that Bush's critical comments to Penn regarding the manner in which she solicited other employees to write statements on her behalf during the Respondent's internal grievance procedure restrained and coerced Penn that and other employees in the exercise of the protected right to engage in concerted activity for the purpose of mutual aid and protection. Accordingly, I find that Bush's statement to Penn violated Section 8(a)(1) of the Act.

The February 27, 2013 Written Warning issued to David Jones and Related 8(a)(1) Allegation

As amended at the hearing paragraph 34(g) of the complaint alleges that on or about February 2013, the Respondent, through Nikolai Stoichkov, violated Section 8(a)(1) of the Act by requiring employees to remove pro union insignia.

David Jones testified that he was employed by the Respondent from August 1, 2010, until January 24, 2014, when he voluntarily left his employment to return to school. He was employed in the environmental services department. Jones was active in the Union's campaign. In this connection, he solicited other employees to join the Union. During the period from December 2012 until mid-February 2013 he wore the union pin indicating "Make It Our UPMC" on his uniform once or twice a week. Jones testified that he wore this pin in the presence of supervisors Karen Reynolds, Gloria Maxell, and Nikolai Stoichkov. According to Jones uncontroverted testimony, in approximately the mid-January 2013, Stoichkov saw him in the supply room in the basement of the hospital, a nonpatient care area. Jones was wearing his union pin and Stoichkov told Jones that if he continued to wear it, Stoichkov was going to have to give him a disciplinary action.

At the hearing, the General Counsel introduced two documents entitled "Documentation of Coaching/Counseling" that were contained in Jones personnel file and produced by the Respondent pursuant to the General Counsel's subpoena duces tecum. Both of these documents were prepared and signed by Stoichkov. The first one is dated February 19, 2013, and states "On 02-19-2013 I spoke to David Jones about wearing union badge on his uniform and that he is not allowed to wear it during working hours or any areas while working and on the clock. (GC Exh. 155.) The second one is dated February 21, 2013, and states, "On 02-21-2013 I spoke to David Jones again about wearing union badge on his uniform and that he is not allowed to wear it during working hours or any areas while working and on the clock. This is the second time he has been made aware of this and was very clear to him that next time he is seen wearing his union badge on the floor while working and on the clock he will be counseled. No exceptions." (GC Exh. 159).

I find that the Respondent's records establish that Stoichkov instructed Jones on two occasions to remove his union pin and on the second occasion threatened him with discipline if he was observed wearing it again. I find that Jones testified credibly regarding his second encounter with Stoichkov which involved a threat of discipline if he continued to wear his union pin. Jones, however, did not correctly recall the date as the Respondent's records establish that the date of these occurrences were February 19 and 21, 2013.

During this same period that Stoichkov instructed Jones to remove his union pin in a nonpatient care area or be subject to discipline, Jones observed other employees continuing to wear personal buttons. As examples, Jones recalled seeing pins depicting pictures of owls and holiday greetings.

As I have set forth above in section of this decision entitled "Alleged Disparate Enforcement of the Solicitation Policy Regarding Union Insignia," employees have a protected right to wear union insignia at work in the absence of "special circumstances." In a healthcare facility restrictions on wearing union insignia in nonpatient care areas are presumptively invalid unless the employer can establish special circumstances justifying its action. There are no special circumstances which would justify the Respondent's action in requiring Jones to remove his union insignia in a nonpatient care area and accordingly I find that the Respondent has violated Section 8(a)(1) of the Act by requiring Jones to remove his prounion insignia.

Paragraph 37, 48, and 53 of the complaint allege that on February 27, 2013, the Respondent issued a written warning to Jones in violation of Section 8(a)(3) and (1) of the Act.

Facts

On February 27, 2013, Jones was working as environmental services employee on the 7a.m.to 3 p.m. shift at Presbyterian Hospital. There is no evidence that he was wearing his union pin that day. According to Jones, at approximately 2:30 p.m. his work for the day was finished and he was in the area of the environmental services supervisors' office in the basement of the hospital. Jones asked Supervisors Karen Reynolds and Tim Armstrong and the arriving second-shift supervisor, Jason Hogan, if they had any work for him to perform and they all replied negatively.

Jones then took the elevator up to the fourth floor to go to a waiting area for patients' families to get a drink for his ride home. As he exited the elevator and was walking down the hall approaching the waiting room, Supervisor Gloria Moxie saw Jones and asked him what he was doing. Jones replied that he was going to get a drink for his ride home. According to Jones, Moxie replied that he could not do that and that he should know that. Moxie also told him that she was going to have to "write him up." Moxie then instructed Jones to accompany her to the room of a patient who had been discharged from the hospital and instructed him to help another employee get the room ready for the next patient. After finishing this assignment, Jones shift was ending and he swiped out and left.

The next day, February 28, Moxie asked Jones to write a statement regarding the incident that occurred the previous day on a form used by the Respondent for witness statements. Jones briefly recounted the incident on the form. In the portion of the

form stating "Please add any additional comments," Jones wrote "If I wasn't for the union would I really be getting this write up!" (GC Exh. 158.)

On March 2, 2013, Jones was called to the supervisors' office, where he met with Reynolds and Stoichkov. Jones was given a written warning (GC Exh. 157) which stated, in relevant part:

> On Wednesday, February 27, 2013, you were scheduled for your work shift. You were witnessed, by Gloria Moxie, Supervisor, on an unauthorized break at 2:45 pm at the main entrance to the 4 East Unit. When asked for the reason, he responded that you were there to get a bottle of soda from the vending machine. Your scheduled break and lunch for that date were as follows: break time 8:30 am and Lunchtime 11:30 am. Therefore this is considered an unauthorized break and a violation of our Absenteeism and Tardiness policy HR-03. Unauthorized breaks disrupt department operations and can negatively impact our ability to provide patient care/ customer service. A single unauthorized break is grounds for the next level of corrective action notice.

The warning further noted that Jones received a verbal warning for a violation of the no smoking ordinance on April 16, 2012, and that is that "in accordance with UPMC policy" he was receiving a written warning.

Current employee Lisa Jones testified on behalf of the General Counsel in support of this complaint allegation. Jones is an advanced patient care technician and testified that there has been occasions when she has gone to a vending machine on the Starbucks on the first floor of the hospital when she has not been on a scheduled break or lunch time. There is no evidence, however, that any supervisor was aware of Jones engaging in such conduct.

On June 30, 2013, Amy DiPasquale, the director of environmental services at Shadyside Hospital, met with Jones and gave him a letter indicating that the written warning he received on March 2, 2013, for taking an unauthorized break on February 27, 2013, would be expunged from his personnel file and not used against him in any way (GC Exh. 156.) DiPasquale testified that she was instructed to give Jones the letter rescinding his written warning from the human resources department. DiPasquale further testified that prior to giving Jones rescission letter, she spoke to Richard Hrivnak, the Respondent's then director of human resources, and informed him that she disagreed with the decision of the human resources department to rescind the written warning because she believed that the warning was consistent with the disciplinary policy.

Analysis

As noted above, prior to receiving his written warning on March 2, 2013, Jones had openly demonstrated support for the Union by wearing his union pin at work. The Respondent was clearly aware of his support for the Union since his supervisor, Stoichkov, unlawfully instructed him to remove his union pin on February 19 and 21 and on February 21 further threatened him with discipline if he continued to wear it. As I noted earlier, the record establishes that the Respondent possesses animus toward the Union's efforts to organize its nonclinical support employees. Accordingly, I find that the General Counsel has established a prima facie case under *Wright Line* and the burden shifts to the Respondent to establish that it would have taken the same action against Jones in the absence of his of his union activity.

DiPasquale testified that the environmental services department at Shadyside hospital operates three shifts and each employee is assigned a 45-minute lunch and a 15-minute break. An employee's lunch and break time is set forth on the schedule each day. If an employee cannot take a break at the scheduled time the employee must notify his or her supervisor and secure permission for another time. Environmental services employees are permitted to take breaks in the environmental services locker room and lounge located in the basement of the hospital, the cafeteria and the West Wing Café. Employees can leave the building for lunch and break but must first notify their supervisor and punch out; employees cannot leave their assigned work areas other than when they are on lunch break. Employees are not permitted to take breaks in patient waiting rooms.[27] DiPasquale defined an unauthorized break as leaving an assigned work area and going to another area when not on an authorized break or taking a break at a time when an employee is not authorized to do so.

DiPasquale testified that the Respondent's corrective action policy was applied in the following fashion in the environmental services department: a verbal warning was given for the initial violation of the Respondents corrective action policy, a written warning was given for a second offense, a written warning in lieu of a 3-day suspension was given for a third offense and finally termination for fourth offense.

On Jones schedule for February 27, 2013, his arrival time listed as 6:30 a.m. and he left at 3 p.m. His break time was scheduled for 8:30 a.m. and his lunchtime was scheduled for 11:30 a.m. (R. Exh. 364.) Thus, it is clear that Jones was taking a break at 2:45 p.m. was at an unauthorized time. Consistent with the Respondents corrective action policy, Jones was given a written warning because he had previously been given a verbal warning for violating the Respondent's no smoking rule. The Respondent introduced records establishing that it imposed the appropriate level discipline on the following environmental services employees on the following dates for taking an unauthorized break or an extended lunch in 2012 and 2013: Jamiya Gamble, September 24, 2012 (R. Exh. 544.); Gary Jackson, February 7, 2013 (R. Exh. 546); Tracy Butler, March 4, 2013 (R. Exh. 543); James McCoy, March 4, 2013 (R. Exh. 549); Gary Jackson, March 13, 2013 (R. Exh. 547); Treay McClendon, May 14, 2013 (R. Exh. 548); Rony Aristil, September 24, 2013 (R. Exh. 542); Francis Togbah, September 24, 2013 (R. Exh. 553); Tony Upshaw, September 25, 2013 (Part. Exh. 554); Damar Read, October 4, 2013 (R. Perry Exh. 551.); William Northington, November 17, 2013 (R. Exh 550); Wayne Smith, November 12, 2013 (R. Exh. 552). The discipline im-

[27] The Respondents environmental services housekeeping policy and procedure dated October 6, 2000, a copy of which Jones signed when he was hired in August 2010, indicates in paragraph I (i) "DO NOT take break time in a public lounge, public lobby, or public waiting room. (Emphasis in the original) (R. Exh. 386.)

posed on Gamble and Jackson occurred prior to the incident involving Jones and thus demonstrates that the Respondent's policy was applied consistently with respect to Jones.

The other incidents occurred after the discipline imposed on Jones. While such evidence is relevant, I assign less weight to it because, in my view, after an employee is disciplined and an unfair labor practice charge is filed, disciplinary action taken by a respondent could be influenced by the desire to show a consistent pattern of discipline for that offense, in order to defend against the unfair labor practice charge. In this circumstance, however, I find that these warnings constitute further evidence of a consistent practice regarding imposing discipline on employees for taking unauthorized breaks in the environmental services department.

With regard to actions of Lisa Jones in going to a vending machine or the Starbucks located in the hospital while not on a scheduled break and lunch, there is no evidence that any supervisor was aware of this conduct. Thus there is no evidence of disparate treatment.

In *Septix Waste, Inc*., 346 NLRB 494 (2006), the Board indicated that in order to establish a valid *Wright Line* defense, an employer must establish that it is applied its disciplinary rules regarding the conduct at issue consistently and evenly. I find that the Respondent has met this burden with respect to the application of its disciplinary rules regarding Jones' conduct in taking an unauthorized break. Under the shifting burden analysis of *Wright Line*, the General Counsel must establish an unfair labor practice by a preponderance of the evidence, *Wright Line*, supra at 1088 fn. 11. I find this burden has not been met with respect to the written warning given to Jones on March 2, 2013. Accordingly, I conclude that the Respondent did not violate Section 8(a)(3) and (1) with respect to the discipline imposed on Jones on that date and I shall dismiss that allegation in the complaint.

The February 28, 2013 Suspension and March 11, 2013 Final Written Warning Issued to Leslie Poston and Related 8(a)(1) Allegations

Paragraph 28 of the complaint alleges that about February 28, 2013, the Respondent, by Gina Barry, disparately enforced its solicitation rule with respect to Poston in violation of Section 8(a)(1).

Poston, a current employee of the Respondent, started working at Presbyterian Hospital on October 13, 2003. At the time of the hearing she was a health unit coordinator (HUC) and had been in that position for approximately 9 years. In this position she is responsible for answering telephones, making appointments for patients and placing current information regarding the nurse and nurse's aide assigned to a patient in patient rooms. At the time of the hearing, she was regularly assigned to unit 9D and her supervisor was Gina Barry.

Poston is an open supporter of the union. In this regard, she began to wear the Union's "Make It Our UPMC" pin in January 2013.[28] Poston had been wearing a Pittsburgh Steelers pin before she began wearing the union pin and wore both of them for a period of about 2 weeks. In early February, 2013, Berry asked her to remove her pins and Poston asked Barry the reason for her request. Barry replied it was not part of her uniform. Poston complied with Barry's request and removed both of her pins. During the period of time that Poston was wearing her union pin she observed employees wearing pins and lanyards that were not issued by the Respondent, including those identifying the Pittsburgh Penguins and the Cleveland Browns. She also saw employees wearing pictures of their children on pins or on their lanyards. After being asked to remove her buttons, Poston continued to observe employees wearing buttons and lanyards that were not related to the hospital such as those described above in patient care areas. Although Barry was called as a witness by the Respondent, she was not asked any questions regarding this incident and thus Poston's testimony is uncontradicted and I credit it.

Poston was working in a patient care area when Berry requested her to take off both her Pittsburgh Steeler and union pins. Poston's uncontradicted testimony establishes that after Barry instructed her to remove her buttons, other employees, working same patient care area as Poston, continued to wear insignia identifying sports teams and pictures of their children. For the reasons I have expressed in detail above in this section of this decision title "The Alleged Disparate Enforcement of the Solicitation Policy Regarding Union Insignia" since the Respondent allowed other types of insignia to be worn in immediate patient care areas, it cannot rely on the presumed validity of a ban against wearing all nonofficial insignia in patient care areas in order to justify instructing Poston to remove the union button she was wearing in February 2013. In addition, the Respondent has produced no evidence to establish that an instruction to Poston to remove her union pin was justified by any special circumstances. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act when it required Poston to remove her union pin in February 2013.

Poston's Suspension and Warning

Facts

Paragraphs 38(a) and (b), 48, and 53 of the complaint allege that the Respondent suspended Poston on February 28, 2013, and issued her a final written warning on March 11, 2013, in violation of Section 8(a)(3) and (1) of the Act.

On February 27, 2013, the Respondent issued a revised solicitation policy that provides in relevant part:

> C. No staff member may distribute any form of literature that is not related to UPMC business or staff duties at any time in any work, patient care or treatment areas. Additionally staff members may not use UPMC electronic messaging systems to engage in solicitation (see also Policy HS-IS0147 Electronic Mail and Messaging). (GC Exh. 162, p. 2.)

This particular provision was unchanged from the previous solicitation policy dated October 10, 2012. (GC Exh. 163, p. 2.)

On February 27, 2013 the Respondent issued an electronic

[28] In addition to openly displaying support for the Union by wearing union insignia at work, as noted above, on February 21, 2013, Poston was among the group of employees that Fishbein and Stenman met with in the cafeteria before the union representatives were required to leave.

mail and messaging policy that provides, in relevant part:

> 1. UPMC Electronic Messaging Systems are provided to facilitate UPMC business, education & research and/or patient care.

Also on February 27, 2013, the Respondent issued an "Acceptable Use of Information Technology Resources" that provides in relevant part:

> 1. UPMC workforce members shall only use UPMC information technology resources for authorized activities. Authorized activities are related to assigned job responsibilities and approved by the appropriate UPMC management. To the extent that a UPMC information technology resource is assigned to an employee, the employee is permitted de minimis personal use of the UPMC information technology resource.

On February 28, 2013, Poston was assigned to work as a "sitter" rather than performing her regular duties.[29] Poston was scheduled to begin work at 7 a.m. on that date but arrived at work early. When Poston arrived she checked her computer in unit 9D and saw that she had received an email from Fishbein containing a letter regarding the recent reinstatement of Ron Oakes and Frank Lavelle. Fishbein had asked Poston to email this letter to coworkers. Poston sent an email dated February 28, 2013, at 6:04 a.m. (GC Exh. 175 and R. Exhs. 24 and 335), that stated:

> Hi, everyone.
>
> I wanted to pass along this letter from our coworkers Frank Lavelle and Ronald Oakes.
>
> Were Back at Work and the Union is Here to Stay!
>
> A letter from Frank Lavelle and Ronald Oakes
>
> Wow.
>
> In all our years at UPMC, nothing can compare to what happened on Monday. Nearly 200 people came out to support us on our first day at work after winning our jobs back as part of the historic settlement of workers' rights charges against UPMC.
>
> It feels great knowing we're here because we stood up with our co-workers to protect our rights. We want to thank our coworkers and the community for being there for us. Together, we prove that it is possible for workers to stand up to UPMC and win.
>
> Now we're back, and we're going to keep working to form our union, so that we can win the good wages, affordable health benefits and respect that we deserve.
>
> We are sharing the news of our victory so that everyone at UPMC knows that we have the right to talk about the union and the improvements we want to make at work. We won't let management stop us from exercising our rights.
>
> Nothing can stop us now.
>
> Sincerely,
>
> Frank Lavelle, Housekeeping, Presbyterian Hospital
> Ron Oakes, Transport, Presbyterian Hospital

Poston sent the email to everyone on the mailing list marked "NU ALL." Poston testified that she knew when she sent the email that there were a substantial number of employees on that mailing list but she did not know how many. The record establishes that the email was sent to approximately 2176 individuals, including employees and supervisors, in 45 patient care units. After sending the email, Poston punched in at the appropriate time and started her shift as a sitter in unit 10d.[30]

Poston testified that later that morning, Linda Haas, the clinical director of Presbyterian Hospital, came into the patient's room where Poston was located and asked her to step into the hallway. When Poston came into the hallway, two security guards asked her to go across the Hall into an office. Poston entered the office with Haas, and saw that Barry and Jaclyn Loveridge, a human resources representative, were already in the office. The security guards remained in a hallway. After Poston and Haas entered the office, Haas informed Poston she was suspended. When Poston asked what for, Haas replied because of the email that Poston had sent out that morning. Poston stated that she sent out a lot of emails, why did this particular one result in a suspension. Haas did not specifically respond to Poston's question but asked Poston if she had any personal items in the hospital. Poston replied that her purse was in the patient's room where she had been working and her coat was located on unit 9d.

Haas left to retrieve Poston's personal items and Barry then read Poston the suspension notice (GC Exh. 151) and gave her a copy. The suspension was for an indefinite period pending completion of the Respondent's investigation. After Barry read the suspension notice, Loveridge asked Poston to write a statement regarding what computer Poston had used to send the email and where that computer was located. Poston then wrote a brief statement indicating the location of the computer that she had used and gave the statement to Loveridge. (GC Exh. 176) When Haas returned with Poston's coat and purse, Poston asked "How does the shuttle run to get me back to my car." Haas replied that that the security guards would take Poston to her car. The security guards then accompanied Poston from the office and gave her a ride to her car.

On March 8, 2014, Berry called Poston and informed her that she could return to work on Monday, March at 11 a.m. and to see her when she arrived. Poston met with Barry on March 11 and was given several documents. Berry gave Poston a "Corrective Action/Discipline Authorization Form." (GC Exh. 149.) On the first page under "Recommended Corrective Action" a check was placed next to "Final Written Warning (Unpaid Suspension 2/28/13-3/10/2013). The second page of this

[29] A sitter is an employee who is assigned to observe patients who are deemed to require close scrutiny. Poston testified that she would volunteer to work as a sitter in order to obtain additional hours.

[30] On February 27, 2013, at 6:51 p.m. an employee sent an email containing the identical letter regarding the reinstatement of Oakes and Lavalle to 34 nonsupervisory personnel employed at the Respondent. (R. Exh. 24; Tr. 288–289.) The parties agreed to redact the names of the sender and the recipients of this email and stipulated that Poston was not the sender

document indicated:

> On February 28, 2013, Ms Poston sent an email using a hospital computer located on patient Unit 9D in Presbyterian. The email was addressed to Nu all which is an address listing for 2176 Presbyterian patient care employees on 45 patient care units. This email contained a letter allegedly written by two other employees concerning their return to work after being discharged from their employment. The letter expressed intent by the two employees to continue to work for the union.
>
> Ms. Poston's use of the email system is a violation of policy HS-ISO 147, Electronic Mail and Messaging since the message did not facilitate UOMC business, education & research and/or patient care. Ms. Poston's use of the email system also violated Policy HS-HR 0704, Corrective Action and Discharge.

Barry also gave Poston a final written warning indicating, in part:

> On February 28, 2013, you sent an email to all nursing associates at UPMC Presbyterian. This email contained a letter written by two UPMC Presbyterian associates recently reinstated to their positions. In this letter, the Associates discussed their reinstatement to work and support of the union. This is in violation of UPMC ISO 147, Electronic Mail and Messaging.

Poston was also given a copy of the "Corrective Action and Discharge" portion of the UPMC policy and procedural manual and the "Electronic Mail and Messaging" portion of that manual.

Loveridge testified that the morning of February 28, Lou Goodman, a vice president of human resources, forwarded Poston's email to her between 8 and 9 a.m. After receiving the email, Loveridge was instructed by Hrivnak and Goodman to obtain a statement from Poston. Loveridge contacted Barry by phone and was informed by Barry that Poston was not on the schedule that day. Loveridge was working in conjunction with Hrivnak on this matter and they contacted the Respondent's IT Department to determine if the email had been sent from a computer in the hospital since Poston was not scheduled in a regular unit that day. IT informed Hrivnak and Loveridge that the email had been sent from a computer on unit 9D. Loveridge and Hrivnak then contacted the security department and security personnel and IT personnel confiscated the computer that Poston had used to send email. The human resources department also determined that Poston was working in another unit, 10D, that day.

According to Loveridge, Hrivnak made the decision to suspend Poston and Loveridge conveyed this decision to Barry. Loveridge testified the reason for the suspension was that if the Respondent allowed Poston to continue to work, it could interfere with the investigation, because if Poston was on the site she would have access to the email system.

Loveridge testified that at the meeting with Poston, Barry informed Poston that it had been brought to their attention that Poston had sent an email that morning on the UPMC system that was not work related and that Poston was being suspended pending the outcome of the investigation. (Tr. 2177.)

Barry testified that she was contacted on the morning of February 28, 2013, as she was on her way to work by Linda Haas who informed her that Poston had sent an email to "NU ALL." Barry asked Haas what the email was about and Haas read to Barry the part of Poston's email regarding the reinstatement of Oakes. When she arrived at work, Barry and Haas spoke to Loveridge by phone. Loveridge informed Barry that Poston had violated the email policy by sending an email to over 2000 employees and that Loveridge would get back to her regarding the discipline to be imposed. Loveridge called Barry at approximately 9 a.m. and informed her that Poston would be suspended pending investigation.

Barry testified that she was "a little nervous" as to how Poston would react because of Poston's behavior during a previous conversation she had had with her. Haas call security to meet with her and Barry on 10D where Poston was working. When Poston arrived Barry told her that she was suspended for sending an email to "NUAll. Barry then asked Poston to write a statement regarding the computer that she used to send the email.[31]

The General Counsel introduced a substantial amount of evidence establishing that the Respondent permitted a variety of non-work-related emails without imposing any discipline on employees for doing so. In this regard, in December 2012, Poston sent the message to all of the individuals employed in unit 9D, including Barry, wishing everyone a Merry Christmas. (GC Exh. 179.) The mailing list for unit 9D is composed of 89 employees. (GC Exh. 2; Tr. 1417–1418.) On March 18, 2013, Barry sent an email to all of the employees in unit 9D regarding the death of the spouse of an employee. (GC Exh. 178.) On March 3, 2013, an employee sent an email message concerning the sale of T-shirts to 7 separate nursing units, which included a total of 328 individuals, including supervisors and managers. (GC Exh. 180; GC Exh 61; Tr. 427.)

The General Counsel introduced three emails that was sent by employees to "NU ALL" as was Poston's. On November 7, 2012, an employee sent such an email seeking the donation of toys to the "Brashear Association" for distribution to those in need (GC Exh. 79). On November 29, 2012, an employee sent such an email with a spiritual message (GC Exh. 80). On December 4, 2012, an employee sent such an email seeking the identity of the purchaser of a winning ticket for a gift basket raffle (GC Exh. 73).

On December 13, 2012, an email asking employees to join in a celebration of some sort was sent to 43 nursing units. (GC Exh. 81) While there is no specific evidence regarding the number of employees that this email was sent to, since Poston's email was sent to 2176 individuals in 45 units, I draw the inference that this email was sent to approximately 2000 individuals.

The email list for the NU 12 S nursing includes approximately 100 individuals, including supervisors. The record contains several examples of nonwork-related emails that were sent to everyone on the NU12S email less during the months of Sep-

[31] As noted above, Poston testified that Loveridge asked her to write a statement regarding what computer she had used. I credit Poston's testimony as she appeared to have a vivid recollection of the events occurring at this meeting.

tember and October 2012. These emails include recipes, information about an international food festival and various jokes. (GC Exh. 74–78.)

Analysis

The Respondent contends that under the Board's decision in *Register Guard I*, supra, it had a right to discipline of Poston for her use of its email system because employees do not have a statutory right to use its email system for Section 7 purposes. The Respondent further contends that the evidence regarding the other nonwork-related emails that were sent by employees and did not result in discipline shows, "at most that there was imperfect enforcement of the policy, not intentional discrimination." Finally, the Respondent contends that because a union organizer requested Poston to send the email her conduct was unprotected because the Union's motive was to generate meritless unfair labor practice proceedings. (R. br., at 195.)

In *Register Guard I* the Board noted that the *Wright Line* analysis is not appropriate when an employee is admittedly disciplined for union or other protected activity. *Register Guard*, 351 NLRB, at 1120, citing *St. John's Hospital*, 337 NLRB 94, 95 (2001). In the instant case, the final written warning that Poston received on March 8 clearly indicates that both the final written warning and her suspension was for sending an email discussing the reinstatement of Lavelle and Oakes and their continued support for the Union. Thus, the warning itself makes it clear that the Respondent disciplined Poston for sending a union related email. *Register Guard I* indicates "although there is no Section 7 right to use an employer's email system, there is a Section 7 right to be free from discriminatory treatment." *Register Guard I* supra, 1120.

In analyzing the final written warning and suspension given to Poston, I find that her February 28 email was not a solicitation. In *Wal-Mart Stores*, 340 NLRB 637, 639 (2003), the Board held: "As defined, solicitation activity prompts an immediate response from the individual or individuals being solicited and therefore presents a greater potential for interference with employee productivity if the individuals involved were supposed to be working." The email sent by Poston did not call for any immediate action by employees, rather it simply informed them of the rally that was held and the continued support of the Union by Lavelle and Oakes. In this regard, it is very similar to the email in *Register Guard I* that was found not to be a solicitation because it merely clarified the facts surrounding a union rally held the day before the email. *Register Guard I*, 351 NLRB at 1119. As set forth above, the Respondent has permitted a variety of nonwork-related emails including several that were sent to the "NU ALL" mailing list and thus reached the same number of individuals as the email sent by Poston. The only difference appears to be that Poston's February 28 email was union-related. Thus, the Respondent's enforcement of its email and solicitation policy with respect to Poston's February 28, 2013, email discriminated along Section 7 lines. Accordingly, by suspending Poston in issuing her a final written warning for sending her February 28, 2013 email, the Respondent violated Section 8 (a)(3) and (1) of the Act. *Register Guard I*, 351 NLRB at 1119–1120; *California Institute of Technology Jet Proportion Laboratory,* 360 NLRB 504, 516–517.

In making this finding, I do not agree with the Respondent's argument that the nonwork-related emails that were introduced into evidence did not establish disparate treatment with respect to Poston's February 28, 2013 email. The dissemination of three emails hospitalwide, which included a substantial number of supervisors and managers, establishes that the Respondent had knowingly tolerated the use of the email system for nonwork related matters in the past. I note, moreover, that there is a substantial amount of other evidence reflecting that nonwork-related emails were sent to a substantial number of employees, but not hospitalwide, with supervisory knowledge.

The Respondent additionally claims that the union related content of Poston's February 28 email was not the basis for discipline because the same email was sent on February 27 by another employee to a far lesser number of employees, without disciplined being imposed. It is clear, however, that this email was sent only to statutory employees and not supervisors and therefore there is no basis for me to find that the Respondent had knowledge of this email at the time it imposed discipline on Poston.

I also find no merit the Respondent's novel argument that because Poston sent the email pursuant to the request of a union organizer, her conduct was unprotected because the Union's motive was to generate meritless unfair labor practices. There is simply no evidence to suggest that the Union's interest in having Poston sent the email was anything other than to inform employees of the rally welcoming Oakes and Lavalle back to work after their reinstatement. Merely because the Union requested Poston to send the email does not serve as a basis to find Poston's conduct unprotected. It is the conduct itself that determines whether it is protected or unprotected, regardless of whether it is done on the employee's own initiative or at the request of a union.

Paragraph 16 of the complaint alleges that about February 28, 2013, the Respondent by Jaclyn Loveridge and/or Linda Haas, violated Section 8(a)(1) by asking Poston to write a statement about her union activity.

As noted above after sending her email regarding the reinstatement of Lavelle and Oakes on the morning of February 28, Poston met with Haas, Barry and Loveridge and Haas informed Poston that she was suspended pending investigation of the email that she had sent that morning. Loveridge then asked Poston to write a statement regarding what computer Poston had used to send the email. Poston then wrote a brief statement indicating the location of the computer that she had used to send the email.

As noted above, I have concluded that the suspension and final written warning issued to Poston for sending her February 28 email are unlawful. Prior to meeting with Poston, the Respondent's IT Department had already determined that the email had been sent from a computer located in Unit 9D. In its brief, the Respondent does not assert why it was necessary to have Poston write a statement regarding this matter but merely claims that the question was noncoercive. (R. brief at p. 199.) I conclude that under the circumstances present in this case, requiring Poston to write a statement about which computer she used to send the email regarding the reinstatement of Oakes and

Lavalle, when the Respondent already knew the answer to that question, establishes that the question was coercive and violates Section 8(a)(1) of the Act.

In reaching his conclusion, I have applied the factors I have noted above in the Board's decisions in *Scheid Electric*, *Intertape Polymer* and *Rossmore House*. In this connection, I find that there is a history of employer hostility to the union and protected activity; the information sought by the Respondent from Poston was information that it already possessed; the question was asked by Loveridge, a human resources representative, who was accompanied by two other supervisors; and the question was asked in a private office with two security guards posted outside the door. Notwithstanding the coercive nature of this interrogation, Poston answered the questions truthfully, consistent with the information the Respondent already had obtained from its IT Department. In finding the questioning of Poston to be unlawful, I specifically rely on the fact that the Respondent was attempting to elicit information from Poston that its IT department had already given to them. Thus, it appears that there was no legitimate investigatory reason to require Poston to write a statement regarding what computer she had sent the email from.

The March 20, 2013 Discharge of Ronald Oakes and Related 8(a)(1) Allegations

Paragraph 15 of the complaint alleges that about February 25, 2013, The Respondent, by Denise Touray and/or Jacqlyn Loveridge in Touray's office, interrogated employees about their union membership and activities in violation of Section 8(a)(1).

Oakes began working at Presbyterian Hospital as a transporter in April 2011 and was discharged in July 2012. As noted above, he was reinstated pursuant to the settlement agreement in Case 06–CA–081896, that was approved by the Regional Director on February 7, 2013. On February 15, 2013, Denise Touray, the Respondent's director of transportation and linen, sent a letter to Oakes indicating that the Respondent was offering him reinstatement to his former position effective Monday, February 25, 2013. The letter also indicated that any reference to his discharge for excessive absenteeism would be removed from his personnel file but that he would be returned to the third step, the "final written warning" stage of the discipline policy, because of other violations of the Respondent's corrective action policy. Oakes returned to work on February 25, 2013. At the end of Oakes' shift at 3 p.m., the Union staged a rally in support of the reinstatement of Oakes and Lavalle across the street from the emergency room entrance to Presbyterian Hospital that was attended by approximately 200 employees. Oakes left work, accompanied by employees Finley Littlejohn and Chaney Lewis to attend the rally. Oakes spoke at the rally, thanking the employees who had attended for their support.

Oakes testified that during the 1st week after his reinstatement, he had a meeting with Touray and Loveridge in Touray's office. They showed Oakes a copy of the letter that Poston had sent out by email to employees at the hospital regarding the rally that was held after his reinstatement. Touray asked Oakes if he knew about the letter and he responded that he did. Touray then asked Oakes how he felt about the letter being sent out with his name on it and he replied that he did not care.

Touray testified that she was asked by Human Resources Director Richard Hrivnak to meet with Oakes and ask him if he was aware that the email had been sent out on his behalf and whether he was comfortable with the email. Pursuant to this instruction, Touray and human resources consultant Loveridge met with Oakes on March 4, 2013, in Touray's office. Touray admitted asking Oakes the questions that Hrivnak had instructed her to ask. Touray testified that Oakes responded that he did not mind that the letter was sent out on his behalf.

On March 4, Touray sent the following email (GC Exh. 32) to Hrivnak stating, in relevant part:

> Jaki and I met with Ron Oakes this morning. I asked Ron if he was aware of the email that was sent out on his behalf. He said he helped draft a letter but he was not aware that it was sent out by email. I showed him the message that was included in the email and pointed out that was signed with his name. I asked him if he requested anyone to send this email on his behalf and he said did not. When asked if he was comfortable with someone signing his name for him on an email he did not send, he said he did not have a problem with this.

I find that Touray's March 4 email, which is corroborated by the testimony of both Touray and Oakes, actually sets forth the conversation between Touray and Oakes on that date.

Applying the factors set forth above in *Scheid Electric* and *Intertape Polymer Co*., supra, I find that the Respondent's interrogation of Oakes on March 4 violated Section 8(a)(1) of the Act. In making this finding I rely on the fact that while Oakes was an open union supporter, he was called into his immediate supervisor's office and questioned about his role in an email sent by another employee involving the reinstatement of Oakes. There was no legitimate purpose in asking Oakes about his role in the preparation of the email since Poston had already admitted to sending it. After considering all the circumstances, I find that Touray's questioning of Oakes regarding this matter was coercive.

The March 20, 2013, Termination of Oakes

Facts

Background

After his reinstatement on February 25, 2013, Oakes worked on the 7a.m.to 3 p.m. shift. His regular supervisor was on vacation when he reported back to work and he was assigned to Supervisor Carolina Clark. Clark informed him that Touray had ordered that he goes through a week of training. Oakes was assigned to work with transporter Claude Smith for this training

As noted above, on about March 5, Oakes was unlawfully interrogated by Touray and Loveridge regarding the email that Poston sent to employees regarding the reinstatement of Oakes and Lavalle.

The Respondent's transportation and services department includes approximately 110 individuals including supervisors. There are approximately 90 transporters that move patients to designated locations in both Presbyterian and Shadyside hospitals. There are five dispatchers and four supervisors who oversee the operations of the transport system and report to Tou-

ray.[32] Approximately 30 of the transporters are transport monitor technicians that have been trained to transport patients who are on heart monitors

Transporters are dispatched to jobs transporting patients by the Respondent's Teletracking system which uses software that allows departments in the hospital to enter a request that patients be transferred from one location to another. The request is placed in a "queue" of jobs that are awaiting assignment to transporters. The Teletracking software finds the closest transporter to the patient and also prioritizes how long that job has been waiting and where it is coming from in order to determine how quickly the job gets dispatched to a transporter. All departments that need to request transport, transporters, dispatchers, supervisors, and Touray have access to the Teletracking system.

A transporter receives assignments through a Spectralink wireless phone which operates only in the hospital. These phones are also referred to as "pickle" phones. A pickle phone is assigned to a transporter each day when a transporter reports to work. The pickle phone is used by transporters to log into the Teletracking system. Transporters also log into the Teletracking system when they arrive at a patient, when they start moving the patient, and when they deliver the patient to the designated destination. The transporters also carry pagers which are permanently assigned to them. As noted above, when a transporter is available for an assignment, Teletracking will assess which transporter is available for a transport assignment and automatically page that transporter. The pager will alert the transporter that there is a pending job so that the transporter knows to call in and accept the job. After receiving notification of an available assignment through the pager, a transporter will use the pickle phone to call into the Teletracking system and log with his or her identification code. The transporter will then hear a recorded message about the assignment such as the originating location and destination. The transporter will then use the pickle phone to accept the job assignment by entering a code that indicates the transporter is accepting the job. Another code is entered if the job is rejected.

After a transporter accepts the job he or she uses the pickle phone to update the Tele-tracking system about the status of the job. For example, when a transporter has reached the patient and the transporters underway, the transporter enters a code into the system to indicate that the job is "in progress." When the patient is delivered to the destination, the transporter will enter a different code into the system to indicate that the transporter has been completed. The Teletracking system will then automatically place a transporter into "idle" status and the process will begin again, with the transporter awaiting the next assignment. The fact that a transporter is in "idle" status does not mean that the employee is not actively working. At times, transporters are given assignments directly by a supervisor or dispatcher, for example, collecting wheelchairs, operating an elevator or, at times, delivering food trays for patients beyond normal hours. During these periods of such direct assignments a transporter will be registered as "idle" in the Teletracking system.

Touray testified that there are two Teletracking records that she normally reviews regarding the activity of transporters. The log viewer file records the activity of each employee daily, including when an employee calls in to check for jobs, when an employee is dispatched for jobs and when a job is completed. (R. Exhs. 135, 517.) The pager history is a record of the pages sent by Teletracking to each employee on a daily basis. Each employee is identified by a specific pager identification number. (R. Exhs. 134, 516.) The pager history is routinely written over by the computer so that the pager history of an employee on a given day is no longer available after a couple of days.

The dispatcher's role in the Teletracking system is to monitor a computer screen that shows the status of all jobs that have been entered into the system as well as the status of all transporters on duty. The dispatchers' have responsibility to ensure that the transport system is functioning efficiently. Dispatchers also answer phone calls from individuals requesting a transport and from those who have questions about a transport assignment that is already in the system. Normally, a dispatcher does not directly assign a job to a transporter and does so only when there is an unusual circumstance.

The Transportation Department maintains a department handbook. (GC Exh. 9.) This handbook indicates the following regarding employee breaks: "Employees have one 35 minute lunch break. This is assigned by the dispatcher." The handbook also contains the following procedures:

> Transporters must view their pager and respond appropriately when receiving a page. (GC Exh. 9, p.17.)
>
> Transporters who are idle must call into the system a minimum of once every five minutes to check for pending jobs even if they are not paged. (GC Exh. 9, p. 18.)
>
> Transporters are permitted to reject a job only when starting their lunch/break or at the end of their work shift. (GC Exh. 9, p.18.)
>
> Transporters who log into the Transport Tracking System within two minutes of their scheduled starting time must accept jobs from the Transport Tracking system to maximum of 5 minutes before the end of the shift. (GC Exh. 9, p. 19.)

Oakes' Discharge

Oakes testified that on March 10, near the end of his shift he arrived back at the transporter office at approximately 2:50 p.m. When he arrived, he observed some employees getting ready to swipe at the end of the shift at 3 p.m. Some employees already had their coats on. According to Oakes, he had completed transporting a patient and there were no jobs that he had been assigned in the Respondent's Teletracking system. Oakes further testified that since it was a Sunday, work had been slow and he decided to return to the office area in order to swipe out at 3 p.m.

When Oakes returned to the office area, he sat down outside the dispatcher's office and began to speak to another employee. Dispatcher Jayme McGough came out of the office and in a loud voice told Oakes that he was going to take another job. Oakes thought that McGough's assignment was unusual since other employees were already outside the dispatcher's office

[32] The parties agree, and the record establishes, that dispatchers are not supervisors within the meaning of the Act.

waiting to swipe out when he had arrived. Oakes went into the office of his supervisor, Grinage, and asked him why McGough was taking a job out of the Teletracking system and assigning it to him. He also complained to Grinnage about the tone in McGough's voice when she made the assignment. Grinage told Oakes "we're having problems with her." Greenwich then asked Oakes to accept a transport at Presbyterian Hospital which Oakes completed and then swiped out.

When Oakes returned to work on March 13, Grinage gave him a piece of paper (GC Exh. 70.) that contained the following information:

> (1) Idle from 1:41 pm-2:03pm. Received 7 pages. Did not respond to pages, did not call into Teletracking every 5 minutes to check for jobs.
> (2) Idle from 2:26 pm-2:50 p.m. Received 5 pages and 3 calls from dispatcher. Did not respond to pages, did not answer the calls from dispatcher, and did not call into Teletracking every 5 minutes to check for jobs.

When Grinage gave Oakes the information, he told him that it had come from Touray and was from the Teletracking system. Oakes told Grinage "This is going to get blown out of proportion." Grinage responded by telling Oakes not to worry about it. Grinage also told Oakes to write out a statement regarding the times mentioned on the paper. [33]Oakes then wrote the following statement (GC Exh. 35) and gave it to Grinage:

> Calls on Sunday 3/10-2:26 patient Mrs. Smith 10 E/W-From Presby to 10 E/W- any time in between did call in "no jobs." Dispatcher never called me.

At the trial, Oakes testified did not recall receiving any direct phone calls from McGough on his pickle phone on March 10. Oakes specifically denied hanging up on McGough on March 10 regarding a job assignment. In addition, Oakes did not recall being paged by the Teletracking system on that date and failing to respond to the pages.

On March 20, Oakes was working when he received a call from Grinage to report to Touray's office. When he arrived at Touray's office, Touray and Grinage were present. Touray told him that he was terminated and handed him a letter dated March 20, 2013, (GC Exh. 33.) which states in relevant part:

> On March 10, 2013 you took two unauthorized breaks while working. Your first unauthorized break occurred from 1:41 pm until 2:03 pm. You were paged seven (7) times and did not respond to these pages. Your second unauthorized break occurred from 2:26 pm until 2:50 pm. You were paged five (5) times and did not respond to these pages. You were called three (3) times by the dispatcher and did not answer your phone. You also did not call into Tele-tracking every five (5) minutes as is required for the Transport Tracking Procedures. These are considered unauthorized breaks.
>
> Your corrective action history is as follows:
>
> 1/23/2012 Final Written Warning in Lieu of a 3-Day Suspension Unauthorized Break
>
> 11/20/2011 Written Warning Unauthorized Absence
>
> As a result of your actions, your employment with UPMC Presbyterian Shadyside is terminated effective immediately.

Jayme McGough was called as a witness by the Respondent. McGough testified that she has been a dispatcher in the transportation office for approximately 2 years. McGough further testified that on March 11, she sent an email to Touray because Oakes' had been on an unauthorized break on March 10. McGough also testified that she was not aware that Oakes was a union supporter when she sent the email. McGough's email to Touray (GC Exh. 34.) states, in relevant part:

> Sunday 3/10 I had a small incident with Ron. He was being paged multiple times by the system, I paged him and I called him 3 times. The first time I called he hung up on me, the other two he ignored. After I couldn't reach him he came into the office and sat down at a table so I called him into transport tracking myself since he clearly wasn't doing anything. I let him know that I called him in and explained to him that he was paged by the system, myself, and called more than once so I assigned him to a job since he wasn't calling in. He said was not going to do it because he didn't pick that job up and I let him know that I picked up the job for him. He still was saying he wasn't going to do it so he went over to Darnell. He did end up doing the job I called him in for but I wasn't sure if I should still write you an email about it or not with the whole union situation, or if how it was handled was fine.

McGough did not testify regarding the incidents referred to in her March 11 email.

Touray testified that she became aware that Oakes took an unauthorized break from the email that McGough sent her on March 11. After Touray received this email, she retrieved data from the Teletracking system (R. Exh. 135.) to determine if Oakes had been idle when McGough claimed that he was. When Touray reviewed the Teletracking records she found a period from 2:26 p.m. to 2:50 p.m. when Oakes was not involved in a transport and was therefore idle. While Touray was reviewing this document she also noticed that Oakes was also idle from 1:41 p.m. to 2:03 p.m. Touray also reviewed the pager history records which indicated the times when Oakes was paged on March 10. These records reveal that 7 pages were sent to Oakes' pager number, 2750, between 1:41 p.m.and 2:01 p.m. and that 5 pages were sent to Oakes pager between 2:33 p.m. and 2:47 p.m. (R. Exh. 134A and B.)

Pursuant to the Touray's request, on March 12, Grinage sent the following email to her (R. Exh. 133.):

> On Sunday 3/10/13 Ron Oaks (sic) came to me asking what's wrong with my dispatcher. He was speaking of Jayme McGough, and I asked him what did he mean. He explained that he came in the office and Jayme told him that he was on a transport job but he actually didn't call in and pick one up. He said Jayme called into the tracking system with his number and assigned him a job. I spoke with Jayme and she said that she tried to call and page Ron multiple times with no esponse. She wanted him to take a job before ending his shift to which he still had 15 minutes left on at the time. I told him that as a

[33] Oakes testimony on this point is uncontradicted as Grinage did not testify at the hearing.

> dispatcher she is able to call in so he can be assigned jobs and he will have to take the job he has been assigned to. He still had 10 minutes left on his shift at that time and he went and did his job.

On March 12, Touray sent the following email to Loveridge and Hrivnak (R. Exh. 512.):

> On Sunday, 3/10/2013, Ron Oakes took 2 unauthorized breaks. The first was from 13: 41-14: 03, the second was from 14:26-14:50. I was notified of the 14:26 break by an email I received on 3/11/2013 from dispatcher Jayme McGough. While investigating this unauthorized break, I uncovered the 13:41 unauthorized break as well.
>
> 13:41-14:03-Paged 7 times from 13:41-14:03. Did not respond to pages. Did not call in to check for jobs every 5 minutes as is expected of all transporters. Was not dispatched on job until 14:03.
>
> 14:26-14:50-Paged 5 times, called 3 times by dispatcher Jayme McGough. Did not answer calls, did not respond to pages. When he came into transport break area during this unauthorized idle time, Jayme told him he was expected to take jobs and respond to pages. She then informed him that she would be calling into Teletracking on his behalf and dispatching him to his next job assignment since he would not call in himself. He then went to supervisor Darnell Grinage to complain that this step was taken by the dispatcher. Darnell explained to Ron that he is expected to work until the end of his shift and that Jayme (and all dispatchers) have the ability to dispatch transporters to jobs themselves if transporters fail to call in to Teletracking to accept jobs. Darnell informed Brown that he would need to complete the job he was dispatched to by Jayme. Ron completed his job at 15:09 and logged out of Teletracking at 15:09.
>
> Attached are supporting documents. The first document is a history of Ron's activity on 3/10/13 in Teletracking. The next two documents are a history of pages Ron received on his pager on 3/10/13. His pager number is 2750. The last two documents are statements from dispatcher Jayme McGough and supervisor Darnell Grinage.
>
> Ron is aware that he must accept jobs until 5 minutes before the end of his shift as he has received corrective action in the past for violating this policy on 1/23/12 for rejecting a job at 2:48 pm on 1/5/2012. His shift on this day ended at 3:00 pm. He is also aware of this policy as it was included in the Transport Department Handbook that was reviewed with him and provided to him on his first day back to work after his reinstatement, 2/25/2013.
>
> Ron Oakes is not here today, but is scheduled to work tomorrow, 3/12/13 from 7a-3p. Please let me know if we should obtain a statement regarding these two unauthorized breaks.

Touray testified that she sent her March 12 email to human resources because any time there is the potential that discipline may be issued, she discusses it with human resources before issuing it. After the human resources department advised Touray to take a statement from Oakes, she had Grinage obtain the statement from Oakes that is noted above. Loveridge and Touray then discussed Oakes and agreed that Oakes had taken an unauthorized break on March 10 and should be disciplined.

Thereafter, the human resources department prepared a "Corrective Action/discipline Authorization Form." This document noted that on November 20, 2011, Oakes had received a written warning for an unauthorized absence and on January 23, 2012 had received the final written warning in lieu of a three day suspension for taking an unauthorized break. Under the caption "Description of Specific Event" the document indicated:

> On March 10, 2013, Ron took two unauthorized breaks while working. His first unauthorized break occurred from 1:41 pm until 2:03 pm. Ron was paged seven (7) times and did not respond to these pages. Ron second unauthorized break occurred rom to 2:26 pm until 2:50 pm. He was paged five (5) times and did not respond to these pages is well. Ron was called three times by the dispatcher and did not answer his phone. These are considered unauthorized breaks.
>
> In addition, Ron did not call into Teletracking every five minutes during this time as is expected of all Transporters for the Transport Tracking Procedures.

This document was signed by the Loveridge, Touray, human resources manager Kathy Grills and Touray's manager, Laurie Rack.

Touray testified that after the requisite signatures were obtained on this document a termination letter was prepared because Oakes was already at the final written warning stage of the corrective action policy. Touray and Grinage met with Oakes and presented him with the termination letter on March 20.

With regard to Oakes conduct on March 10, 2013, the Respondent's Teletracking record (R. Exh. 135) shows that Oakes completed a job at 14:26[34] and immediately thereafter called in to check for jobs but did not receive an assignment. Between 2:33 p.m. and 2:48 p.m. Oakes received 5 pages but did not call into Teletracking during that period. (R. Exh.134A and B.) The Teletracking record also shows that at 13:41 Oakes called in to Teletracking to check for a job (R. Exh. 135). Between 1:41 p.m. and 1:59 p.m. Oakes was sent 7 pages. (R. Exh. 134 A-B). Oakes called in to accept an assignment at 2:03 p.m. (R. Exh. 135).

Oakes testified that he did not recall failing to respond to pages from the Teletracking system on March 10. However, with regard to the time period close to the end of Oakes' shift at 3 p.m., which that was the subject of McGough's email to Touray, the objective pager history records shows that Oakes received 5 pages between 2:33 p.m. and 2:50 p.m. before he responded. The investigation of Oakes' Teletracking records and pager history that Touray undertook on her own initiative established that Oakes received 7 pages between 1:41 p.m. and 1:58 p.m. before he accepted an assignment at 2:03 p.m.

As noted above, McGough testified only that she sent her email March 11 to Touray and that she was not aware that Oakes was a union supporter at the time that she sent her email. McGough did not testify regarding her alleged attempts to

[34] This document records time in military time.

reach Oakes by phone on March 10 or any interaction that she had with him when he returned to the dispatch office new the end of his shift.

I do not find McGough to be a credible witness and I do not credit her testimony that she did not know Oakes was a union supporter when she sent her email to Touray. The email indicates that while Oakes ended up performing the assignment in question that he had not originally accepted, McGough "was not sure if I should write you or email about it or not with the whole union situation." The only possible explanation regarding the reference to "the whole union situation" is that McGough was aware that Oakes was a union supporter when she sent the email to Touray.

Oakes also testified that he did not recall receiving any direct phone calls from McGough on March 10. Since McGough did not testify at the trial regarding any attempts that she made to reach Oakes by phone on March 10, I am unwilling to rely on the claim in her March 11 email that she attempted to reach him three times by phone as I find such hearsay evidence is insufficient to establish that as a fact. Accordingly, I credit Oakes testimony that he did not receive any direct phone calls from McGough, and that he did not hang up on one of her calls

While the objective evidence establishes that Oakes failed to respond to pages during the time periods noted above on March 10, the uncontradicted testimony of General Counsel witness Gregory Bodeck is instructive on this point. Bodeck worked as both a transporter and a dispatcher at Presbyterian hospital from March 2010 until November 1, 2013. According to Bodeck, transporters would often wait for a second or third page before accessing the Teletracking system. Bodeck indicated that an acceptable reason for such conduct would be if the transporter was in the restroom. Bodeck also testified, however, that transporters would, at times, not respond to a page immediately because they were waiting to see whether the assignment would be picked up by another employee. Bodeck credibly testified that he was never instructed that he had to call into the Teletracking system every 5 minutes when he had his pager available and that his practice was not to do so. Bodeck also testified that when he had left his pager home he was instructed that he would have to call in every 5 minutes to ensure that he would receive a job since he was not able to receive pages. In this connection, Touray testified that the Respondent did not issue discipline to transporters solely on the basis of violating the 5-minute rule and that it was used only in conjunction with "other behavior." (Tr. 1505.)

Analysis

In applying the *Wright Line* analysis to the allegation that Oakes was discharged in violation of Section 8(a)(4),(3) and (1) of the Act, it is clear that Oakes was an active supporter of the Union and that he had participated in proceedings before the Board prior to his March 20, 2014 termination.[35] Oakes was named in a prior unfair labor practice charge and was named as a discriminatee in the complaint that issued against the Respondent in the previous Case 06–CA–081896 et al. Oakes was reinstated on February 25, 2013, pursuant to a settlement agreement entered into between the Respondent, the Union and the General Counsel in that case. On February 25, Oakes attended and spoke at the Union rally held across the street from Presbyterian Hospital celebrating his reinstatement along with that of employee Frank Lavelle. During his interrogation by Touray on March 4, Oakes admitted that he had been involved in drafting the email that Poston sent to employees regarding his reinstatement and that it was acceptable to him that his name was used in the email.

Touray's March 4 interrogation of Oakes establishes that the Respondent knew of his continuing support for the Union after his reinstatement. In addition, the Respondent does not deny having knowledge of Oakes' support for the Union and his involvement with NLRB processes prior to his March 20, 2014 termination.

I also find that the Respondent harbored animus toward the union activities of its non-clinical support employees primarily based on the unfair labor practices that I find it committed herein. With regard to the evidence of motivation regarding the 8(a)(4) allegation, I note that Touray admitted that she did not agree with the decision to reinstate Oakes pursuant to the settlement agreement, as she believed his first discharge was appropriate. I also find that the timing of Oakes' discharge, coming shortly after his reinstatement pursuant to the NLRB settlement and after Oakes admitted to Touray his continued support for the Union is also persuasive evidence that the Respondent's motive in discharging Oakes for the second time was his union activity and his participation in NLRB proceedings. *DHL Express, Inc*., 360 NLRB 730, 736 (2014); *Toll Mfg. Co*., 341 NLRB 832, 833 (2004). On the basis of the foregoing, I find that the General Counsel has established a prima facie case under *Wright Line*, and the burden shifts to the Respondent to establish it would have taken the same action against Oakes in the absence of his union activities and involvement in proceedings before the Board.

Turning to the Respondent's defense under *Wright Line*, the Respondent contends that Oakes took two unauthorized breaks on March 10, 2013, and that such conduct constituted a legitimate basis for disciplinary action. The Respondent further contends that since Oakes was at the last step of progressive disciplinary policy such conduct warranted termination. The Respondent further contends it has disciplined other employees for conduct similar to that of Oakes.

As noted above, the Respondent contends that Oakes was at the last step of its progressive disciplinary policy before engaging in the alleged conduct of taking an unauthorized break on March 10, 2013. In fact, Touray specifically testified that Oakes was terminated for his conduct on March 10 because he was already at the final written warning stage of the Respondent's corrective action policy because of his prior conduct. (Tr. 1543-1544).[36] In this connection, the discharge notice that Oakes

[35] The Board applies *Wright Line* in deciding cases involving allegations of discrimination arising under Sec. 8(a)(4). *Grand Rapids Die Casting Corp*., 279 NLRB 662, 668 fn. 24 (1986).

[36] The Respondents corrective action policy (GC Exh. 161, pp. 2–3) specifically provides for the following steps: verbal warning; written warning; suspension/final written warning; and discharge/suspension pending investigation. The suspension/final written warning stage

received on March 20, 2013 (GC Exh. 33) specifically refers to him as receiving a "Final Written Warning in Lieu of a 3-Day Suspension" on January 23, 2012, for taking an "unauthorized break."

In fact, however, the warning that Oakes was given on January 23, 2012, clearly reflects on its face that it is a "Written Warning in Lieu of a Three (3) Day Suspension." for his refusal to do a transport assignment at 2:48 p.m. prior to the end of the shift at 3 p.m. (R. Exh. 119). The "Corrective action/Discipline Authorization Form" that preceded this warning also clearly states on its face that it is for a "Written Warning in lieu of a Three (3)-Day Suspension" (GC Exh. 207). The corrective action and discipline authorization form was signed by a human resources consultant, a human resources manager, a department head and the vice president on dates from January 17, 2012, to January 20, 2012. There is some ambiguity created by the corrective action and discipline authorization form, however, because in the second page of that document the following statement appears: "Due to his actions and previous disciplines, Ronald is receiving a FWW in lieu of a 3 day Suspension." There is no record evidence explaining the apparent discrepancy between the second page of the corrective action and authorization form, which appears from its reference to a "FWW" to mean a final written warning and the first signed page which reflects only a written warning. Given the fact that the corrective action and discipline authorization form reflecting that Oakes was being given a final warning was reviewed and signed by four different managers above the supervisory level, I find that the Respondent intended to give Oakes only a written warning. It is eminently clear that the actual warning given to Oakes and signed by a management official on January 23, 2012, reflects that it is a written warning and not a final written warning (R. Exh. 119.)

Thus, it appears from the Respondent's own documents that Oakes was not, in fact, at the final written warning stage of its progressive disciplinary policy when he was discharged on March 20, 2013. The Respondent's action in discharging Oakes when, in fact, he was not at the final written warning stage of the progressive disciplinary policy supports an inference of unlawful motivation as it is a deviation from its past practice. *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

As noted above, based only on McGough's email and without any report of any alleged misconduct on Oakes's behalf by Supervisor Grinage, Touray reviewed in detail the Respondent's Teletracking and pager history records for Oakes on March 10. Touray did not, however, review the Teletracking or pager history records of other transporters on duty on March 10 in order to compare Oakes activity to other transporters. The General Counsel and the Union argue that Touray did not conduct a meaningful investigation prior to concluding that Oakes had taken an unauthorized break that warranted discipline. I note that the Board has found that the failure to conduct a meaningful investigation has been found to be an important factor in determining whether there is discriminatory intent. *K & M Electronics, Inc*., 283 NLRB 279, 291 fn. 45 (1987). In support of their contention, the General Counsel and the Union rely on a log viewer Teletracking record for March 10, 2013, that is kept in military time. (GC Exh. 205) This document indicates the activity of all of the transporters on that date, using initials to identify them. For example, Ronald Oakes is identified as "ROAK." General Counsel Exhibit 205 indicates the following activity of other transporters on March 10, 2013:

Transporter CWER checked into the system at 13:17 and was not dispatched until 13:56.CWER also checked in at 14: 32 and did not check him again until 14:53 (GC Exh. 205, pp.14–18). Transporter ESTA checked into the system at 10:12 and did not check in again until 10:45 and was not dispatched until 10:59 (GC Exh. 205, pp. 7–8). TEDM checked in at 14:19 and was not dispatched until 14:36 (GC Exh. 205 pp. 17–18). NPAS checked in at 2:03 and was not dispatched until 14:41 (GC Exh. 205 pp. 16–17). ADRE logged out of the system at 12:23 and did not log in again until 14:18 and then immediately logged out again (GC Exh. 205, pp. 12, 17). ADRE next checked in at 14:54 (GC Exh. 205 p. 18). Finally, MMCC completed an assignment at 13: 58 and rejected jobs at 13:58, 14:10 and 14:17 before being dispatched at 14:18 to another assignment (GC Exh. 205 pp. 16–17).

The fact that these employees were not shown to have been actively working under the Teletracking system does not necessarily mean they were not performing work as the Tele-tracking system does not account for certain tasks, but the lack of activity during these periods would appear to have required investigation, in order to determine if Oakes activity on that day was out of the ordinary.

As noted above, the pager history of employees is automatically written over the computer in a matter of days. The "screen shot" of Oakes' pager history for March 10 that Touray took as part of her investigation does show that the transporter assigned to pager 1699 received nine pages between 12:58 p.m. and 1:29 p.m., four of which occurred between 12:58 p.m. and 1:08 p.m. In addition, the transporter assigned pager 2513 received seven pages between 2:06 p.m. and 2:40 p.m. (R. Exh. 134.) Again, there was no investigation as to why these employees were sent numerous pages without responding.

The record does contain evidence establishing that the Respondent has disciplined other transporters for taking an unauthorized break. In this regard, a corrective action/disciplinary authorization form signed by Respondent managers on April 25 and April 26, 2011, reflects that Mariah Jackson was given a written warning in lieu of a 5-day suspension on April 26, 2011, for taking an unauthorized break. Prior to this incident, Jackson was already at the final written warning stage of the Respondent's progressive disciplinary procedure, as she had been given a final written warning on December 20, 2010 for transferring a patient to a wrong location. Jackson's corrective action/discipline authorization form indicates that on April 13, 2011, she finished a patient transport assignment at 9:31 p.m. and became idle. She did not call back into the transport tracking system to check for pending assignments until 10:10 p.m. During this period there were several attempts to contact her on both her phone and pager to inform her that there were patients waiting to be transferred. (R. Exh, 525, pp. 8–9.)

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provides that suspension without pay of up to 5 days or a final written warning is used to address continuing problems where previous action has been ineffective.

On August 16, 2011, Joshua Young was given a written warning for taking an unauthorized break on August 2, 2011, and incorrectly transporting a patient on August 3, 2011. With regard to his unauthorized break, Young was dispatched to assist a coworker in transporting a deceased patient to the morgue at 1:08 p.m. At approximately 1:20 p.m. his supervisor noticed that it was taking longer than normal to complete the assignment and both Young and his coworker were paged. After the supervisor did not receive a call back from either employee, he proceeded to the morgue and noticed that both transport stretchers were empty and sitting outside of the morgue. After checking with the dispatcher to see if the assignment had been completed and being informed that it had not, the supervisor returned to the morgue area. At that point he found Young talking with his coworker while Young's assignment was still showing " in progress" in the Teletracking system. For both the unauthorized break and the improper transport of a patient, Young was given one written warning. (R. Exh. 525, pp. 10–11.)

On November 14, 2012, Olivia Horton was given a final written warning in her orientation period (CP Exh. 18). The warning indicates "On 11/13/12, at 2:47 pm, you were instructed by your dispatcher to call into Teletracking and accept a job assignment. You refused to accept a job assignment and used inappropriate and unprofessional language towards the dispatchers. This does not reflect the values of dignity and respect expected by all UPMC employees. Additionally, all transporters are expected to except job assignments until 5 minutes before the end of their shift."

On January 3, 2013, Bridgette Fields was given a written warning taking an unauthorized break on December 16, 2012. Fields was idle for 139.59 minutes and during this period of time was paged six times, rejected the work she was assigned in Teletracking and refused to complete the job assigned to her by the dispatcher. (R. Exh. 525, p. 3.)

On January 7, 2013, Jayme McGough was given a written warning in lieu of a 3-day suspension for an unauthorized break. McGough had previously been given a written warning under the Respondent's progressive disciplinary policy. Her warning indicated that on December 19, 2012, McGough was idle for 82 minutes. During this time she had been paged twice by tele-tracking and did not respond. While McGough claimed that she was taking jobs outside of the system and that a coworker could affirm that, the statement of the coworker indicated he did not recall the jobs that McGough mentioned being completed with him. (R. Exh. 528.)

On January 10, 2013, India Johnson was discharged for an unauthorized break during her orientation period. Johnson had previously received a final written warning during her orientation period. The January 10, 2013 warning reflects that on December 16, 2012, Johnson was idle for 78.95 minutes. During this period she was paged three times and was assigned a job when she called into the Teletracking system but rejected the job. Due to her actions, patients were waiting for transport for an extended period of time. Johnson admitted not accepting the last call because she would have been late for her bus if she had accepted it. (R. Exh. 525, pp. 1–2.)

On January 16, 2013, Phillip Johnson was given a final written warning for taking an unauthorized break. Prior to this incident, Johnson was at the written warning stage of the Respondent's progressive disciplinary system. Johnson's warning indicates that on January 8 he was idle for 51 minutes. During this period of time he was paged 12 times but did not respond. (R. Exh. 527.)

On March 14, 2013, Olivia Horton was given a final written warning for taking an unauthorized break. Horton had previously received the final written warning during her orientation period. Horton's warning indicates that on March 6, 2013, she was at lunch from 9:15 p.m. until 10:45 p.m, and that her lunch should have concluded at 9:50 p.m. During this period, Horton was paged multiple times by the dispatcher but failed to respond and did not request permission to extend her lunch by approximately 55 minutes. Horton admitted that she extended her lunch but claimed that it was due to her losing her debit card and going to look for it (R. Exh. 525, pp. 5–6.)

The above noted warnings establish the Respondent's disciplinary record regarding unauthorized breaks before it discharged Oakes for an unauthorized break on March 20, 2013. The Respondent also introduced evidence regarding employees disciplined for taking unauthorized breaks after March 20, 2013. As I noted in assessing whether the warning given to Jones was unlawful, such evidence, while relevant, is entitled to less weight in my opinion.

The evidence of discipline administered to employees for taking an unauthorized break after Oakes' March 20, 2013 discharge consists of the following:

On April 19, 2013, Donald Luffley was given a written warning for taking an unauthorized break. Luffley's warning indicates that on April 12, 2013, he was dispatched on a call that took 31 minutes. The warning indicates that taking 31 minutes to travel between the two units involved "is excessive and is considered an unauthorized break." (R. Exh. 525, p. 7.)

On October 18, 2013, Ashley McGhee was discharged for taking an unauthorized break. McGee had previously received a final written warning during her orientation period on July 11, 2013. McGhee's October 18, 2013 warning indicates that on September 21, 2013, she was idle in Teletracking from 1:49 p.m. until 2:51 p.m. and that this was considered an unauthorized break. (R. Exh. 525, p. 4.)

Finally, Barry Johnson received a verbal warning on December 20, 2013. Johnson's warning indicates: "On December 17, 2013 you completed the transport assignment at 7:25 PM. You then remained idle until your assigned lunch break at 9:04 PM- a total of 1 hour and 35 minutes. During this one hour and 39 minutes period, you were paged 15 times to call into teletracking and accept a job assignment. You did not respond to these pages. You also did not call in to check for jobs assignments every 5 minutes. All transporters are expected to immediately respond to pages in to check Teletracking for job assignments every 5 minutes. This is considered an unauthorized break." Johnson received a verbal warning because he had no prior discipline. (R. Exh. 525, p. 14.)

In assessing the Respondent's defense, I note that in order to meet the *Wright Line* burden of establishing that it would have taken the same action against Oakes in the absence of his union activity, the Respondent must establish that it has consistently

and evenly applied its disciplinary rules. *Septix Waste, Inc*., 346 NLRB 494, 495–496 (2006). In this regard, as I have previously noted, an employer simply cannot present a legitimate reason for its action but must prove by a preponderance of the evidence that it would have taken the same action in the absence of the protected activity. *W.F. Bolin, Co*., supra. While the Respondent has produced evidence that it has disciplined employees for taking unauthorized breaks, I must consider this evidence in the context of the Respondent mischaracterizing the correct status of Oakes' position in the Respondents progressive disciplinary system when it discharged him on March 20, 2013, for allegedly taking an unauthorized break. As I have noted above, prior to March 20, 2013, Oakes had received a written warning but had not received a final written warning. I also must consider the evidence set forth above establishing that Touray focused only on the conduct of Oakes on March 10, 2013, without regard to the manner in which other employees were effectuating their transporter duties on that day.

In assessing the Respondent's evidence regarding other employees disciplined for taking an unauthorized break, I note that the only employee discharged for such an offense prior to Oakes was India Johnson. As noted above, this occurred during her orientation period after she had received a final written warning. In addition, Johnson had been idle for approximately 80 minutes.

The other employee discharged for taking an unauthorized break was Ashley McGhee. In the first instance, she was discharged on October 18, 2013, after Oakes was discharged and therefore this evidence is entitled to less weight. While I cannot determine from her termination letter whether she was still in her orientation period when she was discharged, it is clear that McGhee did receive a final written warning during her orientation period on July 11, 2013. I also note that her unauthorized break lasted over an hour.

Jackson, Fields, McGough, India Johnson, Philip Johnson, Horton, and Barry Johnson had all been in in "idle" status for longer periods than Oakes. The Respondent's investigation clearly established that Young and McGough were not engaged in their duties while India Johnson and Horton admitted that they had not been working during the period that was considered an unauthorized break. Fields, India Johnson, Horton, and Luffley had either affirmatively rejected or refused work during the period that they were considered "idle." Young, Fields, McGough, and Philip Johnson had all caused delays in patient care.

I find particularly important that Jackson was given a second final written warning for taking an unauthorized break when she was already at the final written warning stage of the Respondent's progressive disciplinary procedure. McGough was given a second written warning for taking an unauthorized break when she was already at the written warning stage of the disciplinary procedure. Horton was also given a second final written warning for taking an unauthorized break after she had previously received a final written warning. All these employees could have received greater discipline under the Respondents progressive disciplinary policy.

Oakes, however, was discharged for his alleged unauthorized break when in actuality he was at the written warning stage of the progressive disciplinary policy. There is no evidence of another employee who was beyond the orientation period, who was at the written warning level of discipline, but was discharged for an unauthorized break rather than receiving a final written warning. I also note that it was not affirmatively established that Oakes was not actively working during the period of his alleged unauthorized break and he did not refuse or reject work. Finally, there is no evidence to show that he caused any delay in patient care on March 10, 2013.

After considering all of the circumstances, I conclude that the Respondent has not presented sufficient evidence to establish that it has consistently and evenly applied its unauthorized break policy to Oakes as it is required to do so under *Septix Waste*, supra. I therefore find that the Respondent has not produced sufficient evidence under *Wright Line* that it would have discharged Oakes for his conduct on March 10, 2013, even if he had not engaged in union activity or testified before the Board. Accordingly, I find that the General Counsel has established by a preponderance of the evidence that Oakes' discharge violates Section 8(a)(4), (3), and (1) of the Act.

The March 9, 2013 Discharge of Finley Littlejohn

The complaint alleges that Littlejohn was discharged in violation of Section 8(a)(3) and (1) of the Act.

Facts

Littlejohn began working for the Respondent as a transporter on April 22, 2012. After approximately 6 months Littlejohn became certified as a monitor technician. Littlejohn worked on the 3 p.m. to 11 p.m. shift and his supervisor was Hank Rankin. According to the credited testimony of Fishbein, Littlejohn was a member of the committee of employees who were supporting the Union's organizing campaign.

As noted above, Littlejohn left Presbyterian Hospital on the afternoon of February 25, 2013, together with Oakes and Chaney Lewis to attend the rally the Union had scheduled across the street from the Presbyterian Hospital emergency room. Littlejohn was wearing a transportation department uniform and his ID badge. (GC Exh. 198.) Several of the Respondent's security guards, including Donald Charley, the Respondent's vice president of parking and security, were standing outside the emergency room entrance to the hospital as the three employees exited the building and walked across the street to attend the union rally. The Respondent's security personnel engaged in surveillance of the rally and reported on it to certain Respondent administrators. In this connection, an email sent by a security officer to the Respondent's security administration on February 25, 2013, at 2:45 p.m., indicated that Union was holding a rally for the employees that had been discharged. The security officer reported that the employees were at that time walking to Presbyterian Hospital and further reported "Them being there is a disruption." On February 25 at 4:38 p.m., Charley sent an email to several of the Respondent's administrators, including Hrivnak and Goodman in human resources, that the rally had been "orderly but loud" and an ended at approximately 3:15 p.m.. (GC Exh. 164.) These emails did not contain the names of any employees who attended the rally.

The Respondent's Teletracking record establishes that Littlejohn began work on February 22, 2013 at 15:02 (3:02 p.m.)

(R. Exh. 517.) Littlejohn testified that he had finished transporting a patient to the Montefiore building at approximately 10:40 p.m. After Littlejohn had delivered the patient to the designated location, the Teletracking record establishes that Littlejohn logged in to indicate that he had completed that assignment at 22:41:21. The Teletracking record also establishes that Littlejohn rejected an assignment at 22:41:39. (R. Exh. 517.) Littlejohn testified that immediately after completing his previous assignment he had a need to use a stall in a restroom and that he entered the restroom at approximately 10:45 p.m. Littlejohn experienced some difficulty in the restroom and it took him some time to eliminate the waste from his system. During the period of time that he was in the restroom stall, the Teletracking system paged him at 10:47p.m., 10:50 p.m., 10:57 p.m., and 11 p.m. Littlejohn did not immediately answer the pages because he felt it was "disgusting and unsanitary to answer a page and call on the pickle phone" while he was in the restroom stall. Littlejohn testified that after washing his hands, but while still in the restroom, he attempted to call into the Teletracking system but the battery fell out of his pickle phone. (Tr. 1039–1040.) After Littlejohn placed the battery back into the phone, he received a call from dispatcher Jason Spirk, who asked Littlejohn "what was going on."[37] Littlejohn replied that he had been using the restroom. Spirk told Littlejohn there was a job in the system and asked Littlejohn if he could handle it. Littlejohn accepted the assignment, which involved the transport of an emergency room patient to the Montefiore building.[38] The assignment took approximately 20 minutes to complete because after Littlejohn arrived at the emergency room and attached a heart monitor to the patient he had to wait for the doctors and nurses to finish their notes and release the patient to be transported.

I credit the testimony of Littlejohn that he was in the restroom from approximately 10:45 p.m until approximately 11:10 p.m. His testimony in this regard was detailed and plausible and entirely uncontradicted. I find, however, based on the objective Teletracking report, that he rejected the assignment to transport a patient from the PACU Center at 22:41:39 (10:41:39 p.m.). While Littlejohn may have had cause to reject the assignment at that time given the fact that he was about to enter the restroom, he did not testify that this was the reason. In fact, he did not testify at all regarding the Teletracking record establishing the fact that he called in to reject the assignment at 22:41:39. I find that the Teletracking system's record that this assignment was rejected at 22:41:39 did not occur as a result of the batteries following out of Littlejohn's pickle phone. Littlejohn's testimony clearly establishes that the batteries fell out of his phone while he was in the restroom and that he entered the restroom at approximately 10:45 p.m. He did not testify that the batteries fell out of the pickle phone in the 17 seconds that elapsed between his entry into the Teletracking system that he had completed his previous assignment and the assignment to transport a patient from the PACU.

After Littlejohn had taken the patient to the designated location in the Montefiore building, he returned to the transportation office in Presbyterian Hospital. As Littlejohn arrived at the transportation office, he saw Spirk and apologized for how long the assignment had taken but that he had to wait for the patient to be released to transport. Spirk said that was "okay" and that he was going to send Touray an email so that they "will be on the same page" and there should not be a problem with it. Littlejohn then swiped out at approximately 11:27 p.m. and left the hospital.

That evening at 11:44 p.m., Spirk sent an email to Touray regarding Littlejohn. This email (R. Exh. 70) states in relevant part:

> I took over dispatch at 11:00 pm and Pacu central called asking why a monitor tech hasn't been dispatched to their job which was put in at 10:41 pm. Finley was the monitor tech and he was idle since 10:41 pm also. They said they were super busy and demanded a monitor tech, and so I tried to call Finley but no answer. Hepicked up around 11: 10 or so and I asked him if he could do the Pacu monitor patient and he agreed to. So him and Matt Recker took the patient over in their bed. So Finley clocked out at 11:27 approximately. I tried to ask Janelle why he was idle, and didn't get the Pacu job? She didn't know why and said she missed it.

On Monday, February 25, at 6:48 p.m., Touray replied by email to Spirk's email and asked him what time he began calling Littlejohn. Touray added: "I will research in Teletracking on Tuesday-I was out on sick on Monday."

On Wednesday, February 27, at 3:20 a.m. Spirk responded to Touray by an email stating in relevant part: "Probably no later than 11:05. I tried and he didn't pick up until maybe 11:10 or so?"

On February 27, Rankin asked Littlejohn to write a statement about the events of February 22.[39] According to Littlejohn's uncontradicted testimony, Rankin asked him to write a statement regarding what happened. When Littlejohn asked "why," Rankin responded there was nothing to worry about but that Rankin had to give Touray a statement from Littlejohn.[40] Littlejohn's written statement (GC Exh. 42) is dated February 27, 2013, and states in relevant part:

> In regards to not answering my pager (4) times & rejecting the call, was that during the time my pager was going off I was in the bathroom. During the time I was in the bathroom I dropped the phone while I was about to accept the job. At no

[37] The record establishes that the batteries frequently fall out of the pickle phones but can be reinserted in a matter of seconds.

[38] Littlejohn testified he did not recall logging out of the Teletracking system that evening. The tele-tracking record establishes, however, that he logged out at 23:02:22. (11:02 p.m.) This fact clearly establishes that at 11:02 p.m., Littlejohn's pickle phone was in operation.

[39] Littlejohn testified at the hearing that Rankin asked Littlejohn to give him a statement on February 23, the day following the events at issue. The record clearly establishes, however, that Touray was not aware of the February 22 incident involving Littlejohn until Monday, February 25. Thus, I find that Littlejohn was incorrect when he testified he was asked to give a statement by Rankin on February 23 as Touray's investigation into this conduct had clearly not begun on that date. I find, based on the record as a whole that Littlejohn gave his statement on the date indicated on the statement, February 27, 2013.

[40] The Respondent did not call Rankin as a witness.

> time whatsoever was Finley Littlejohn attempting to defer his duties. Instead Jason called me to complete it around 11:00 PM and since it was over in [Montefiore] it took 10 min. to do.

On March 9, Littlejohn was called into the transportation office by supervisor Ed Keller. Keller handed Littlejohn a letter and said that he had to let him go. When Littlejohn asked what for, Keller replied that it was for failing to accept a page. The termination letter that Keller gave Littlejohn (GC Exh. 39) states, in relevant part:

> During your shift on February 22, 2013, you failed to respond to multiple pages and even rejected it at one point. During the time that you failed to respond and/or rejected the job, you were not on an authorized break. Your actions were inappropriate and you are considered to have been on an unauthorized break.

The letter further indicated that Littlejohn had received a final written warning in lieu of a 3-day suspension for excessive tardiness on January 2, 2013. The letter also indicated that he had received a final written warning in his orientation period on September 11, 2012, and a verbal warning on August 1, 2012, for excessive tardiness. The letter advised Littlejohn that he was terminated effective immediately.

After his discharge Littlejohn filed a grievance with the Respondent regarding his discharge under the Respondent's internal grievance procedure. In support of his grievance, Littlejohn submitted a statement denying that he was on an unauthorized break on February 22. In his statement he indicated that he received the call in question but when he answered the call the battery in his pickle phone fell out of the phone. He denied that he rejected the call and noted that he ultimately completed the assignment (R. Exh. 75.)

In a letter dated April 1, the Respondent's then director of human resources, Richard Hrivnak, denied Littlejohn's grievance and upheld his termination.

Current employee Jason Spirk testified that he has been a dispatcher in the transportation Department for approximately 5½ years. On February 22, 2013, his shift began at 11p.m. Spirk was replacing dispatcher Janelle Hinds whose shift ended at 11p.m. Spirks asked why the Teletracking system showed a patient had been assigned to Littlejohn but had not been transported. Hinds replied that she had missed the job and did not say whether she had tried to reach Littlejohn. Spirk called Littlejohn but did not reach him. At approximately 11:10 p.m., Littlejohn called Spirk and Spirk asked Littlejohn to transport the patient because they were getting complaints from the unit that had requested the transport. Littlejohn accepted the assignment and, in fact, transported the patient.

Spirks testified that he sent his email to Touray on February 22 because Spirk had asked Littlejohn to work beyond his scheduled shift and Spirk did not want Littlejohn to be charged with an" unauthorized swipe." [41] Spirk testified that as of February 22, he was not aware of any union activity engaged in by Littlejohn nor was he aware of where Littlejohn stood on the Respondent's progressive disciplinary policy. Spirk was not interviewed by Touray or any other management representatives prior to Littlejohn's discharge.

Touray testified that she was not aware that Littlejohn was a supporter of the Union prior to his discharge. In this connection, Touray indicated that she had never discussed the Union with Littlejohn nor had she observed him display any support for the Union. With respect to Littlejohn accompanying Oakes to the union rally on February 25, Touray testified that she was not at work that day but was rather at home sick. While Touray testified she knew the Union had planned to have a rally on that date she had not seen any pictures of Littlejohn going to the rally or attending the rally prior to his discharge.

According to Touray, she did not see Spirk's February 22 email until Monday, February 25, as she does not work on the weekends and she was home sick on February 25. As noted above, Touray replied to Spirk's email on February 25 at 6:48 p.m. In her email, Touray asked Spirk when he began calling Littlejohn and informed Spirk she would research Teletracking information regarding Littlejohn on Tuesday, February 26. In this connection, Touray reviewed "log time" information from Teletracking regarding Littlejohn's activities on February 22 (R Exh. 517.) According to Touray, the log viewer confirmed that Littlejohn had completed the transport of a patient at 22:42:21 (10:42:21 p.m.) and rejected another assignment at 22:42:39 (10:42:39 p.m.). Touray also reviewed the pager history for Littlejohn on that date. (R. Exh. 516.) This document reflects that pages were sent to Littlejohn's pager ID (0296) at the following times: 10: 47:17 p.m.; 10:50:52 p.m.; 10:57:29 p.m.; and 11: 00:57 p.m.

Touray testified that she submitted the log file viewer, the pager history, Spirk's email and Littlejohn's statement to Loveridge in human resources. A series of emails indicates that Littlejohn's statement was the last information that was submitted to Loveridge (R. Exh. 519). On February 28 at 12 a.m., Rankin sent Littlejohn's statement to Loveridge and Touray by email. On February 28 at 11:01 a.m Touray sent an email to Rankin asking "Can you please ask Finley why, if he dropped his phone and this made him reject the job, he didn't just called back in and immediately accept the job?" On February 28 at 10:29 p.m. Rankin replied to Touray in an email indicating "His response was that the battery fell out the phone and he could not reach it and by the time he was out of the bathroom, Jason called him at around 10:55 p.m. to ask him to complete the job."

On March 1, 2013, at 10:03 a.m., Touray sent an email to Marina Goodman, a human resources consultant who was filling in for Loveridge, indicating the following: "Marina-See follow-up below regarding Finley Littlejohn's potential unauthorized break. "What do you think, I'm leaning towards still considering this an unauthorized break." On March 1 at 10:19 a.m. Goodman replied:" I have to agree with you since 14 minutes passed prior to responding to the call. I will prepare the paperwork for Jaki so, it is ready for Monday. Is that okay?"

Touray testified that she spoke to both Goodman and Loveridge regarding Littlejohn and that a decision was made that he

[41] The record establishes that if an employee swipes in more than 5 minutes before or 5 minutes after a scheduled shift, the employee may be charged with an "unauthorized swipe" which is considered an occurrence under the Respondents attendance policy.

was on an unauthorized break and that the Respondent would proceed with discipline, which in Littlejohn's case would be termination based on his previous discipline record. Loveridge then drafted a corrective action/discipline authorization form (GC Exh. 41) that listed Littlejohn's previous discipline record and indicated that the recommended corrective action was discharge. The second page of the document indicating "description of specific event" states:

> February 22, 2013 at 10:41 PM, PACU placed a request for a Transport Monitor job. Finley was paged to pick up the job; however, he was paged 4x prior to responding to the job.
>
> Below are the following times he was paged:
>
> 1st page: 10:47 pm
> 2nd page: 10:50 pm
> 3rd page: 10:57 pm
> 4th page: 11:00 pm
>
> Finley rejected the job during the page process. In his statement, he states he was in the restroom and dropped the phone and the battery on the phone came off and was unable to pick up the battery and reconnect it to the phone. Finley finally responded to the page at 11:00 p.m. and finished the shift at 11:27 p.m.

This document contains Loveridge's typed name with the date of March 5, 2013. On March 8 it was signed by Human Resources Manager Laura Zaspal; Touray; Lori Rack, who is Touray's supervisor; and vice president, Holly Lorenz. There is also the signature of a human resources representative that Touray could not identify

On cross-examination by the Charging Party, Touray could not recall whether she told Loveridge prior to her preparation of this document that transporters are not required to respond to pages that come to them immediately prior to the end of their shift. [42] At the trial, Touray conceded that Littlejohn was not required to respond to the pages at 10:57 p.m. and 11 p.m. that were listed on the corrective action form that resulted in Littlejohn's discharge as his shift was scheduled to end at 11 pm.

After the corrective action form was returned to the human resources department, Loveridge drafted the discharge letter that was signed by Supervisor Edward Keller on March 9, 2013, and given to Littlejohn by him on that date.

Analysis

In applying the *Wright Line* factors to Littlejohn's discharge, it is clear that he was a supporter of the Union. He was a member of the Union's employee committee and, on February 25, 2013, openly displayed his support for the Union by walking out of the Respondent's facility with Oakes and Lewis and attending the union rally held across the street from the emergency room entrance to Presbyterian Hospital.

The Respondent denies, however, that Touray and Loveridge, the individuals primarily involved in the decision to discharge Littlejohn, had any knowledge of Littlejohn's support for the Union at the time he was discharged. In this connection, at the trial, both Touray and Loveridge denied that they had knowledge of Littlejohns' support for the Union. There is no direct evidence that either Touray or Loveridge either directly observed or was informed of Littlejohn's union activity before his discharge.

The Board has held, however, that knowledge of an alleged discriminatee's union activity may rest on circumstantial evidence from which a reasonable inference may be drawn. *Montgomery Ward & Co.*, 316 NLRB 1248, 1253–1254 (1995), enfd. 97 F.3d 1448 (4th Cir. 1996). In *Montgomery Ward,* the Board noted that it has inferred knowledge of union activity based on circumstantial evidence such as the timing of the alleged discriminatory action; a respondent's general knowledge of union activity; the respondent's animus toward union activity; and the weakness of a respondent's reasons for the adverse personnel action. Id. at 1253.

Applying the factors noted above, I find that compelling circumstantial evidence supports a finding that the Respondent, specifically Touray and Loveridge, had knowledge of Littlejohn's overt support for the Union that he demonstrated on February 25 by walking out of Presbyterian Hospital with Oakes and Lewis and attending the union rally held across the street. There is substantial evidence that the Respondent, and specifically Touray and Loveridge, were generally aware of the Union's organizing efforts. In this regard, both Oakes and Lewis, prominent and open supporters of the Union, worked in the transportation department, which was managed by Touray. Loveridge was the human resources representative assigned to work with Touray regarding labor relations issues in that department. As noted above, the Respondent's security personnel engaged in surveillance of the union rally on February 25 and a report regarding this rally was submitted to Hrivnak and Goodman in the human relations department. Since Oakes was one of the principal speakers at the rally and was accompanied from the hospital to the rally by Lewis and Littlejohn, I find it reasonable to infer that Touray and Loveridge were informed of Littlejohn's open support for Oakes and the Union shortly after it occurred.

As I have noted earlier in this decision, the Respondent's animus toward the Union's attempt to organize its nonclinical support employees is clearly demonstrated by the unfair labor practices I find that it committed. This animosity toward union activities also supports an inference that Littlejohn's department manager and the human resources representative assigned to that department were made aware of the overt union activity he engaged in on February 25.

The timing of Littlejohn's discharge further supports an inference that his termination was unlawfully motivated. While Littlejohn was not discharged until March 9, Touray began an investigation into Littlejohn's actions on February 22, on February 26, after receiving Spirk's email informing her that Littlejohn had to stay beyond his scheduled shift to complete an assignment. Thus, shortly after Littlejohn's overt union activity on February 25, Touray began to investigate his conduct on February 22 even though neither Spirk nor Supervisor Rankin

[42] As noted above, the UPMC Presbyterian transportation department handbook, paragraph 18, states: "Transporters who log into the Transport Tracking system within 2 minutes of their scheduled starting time must accept jobs from the Transport Tracking system to a maximum of 5 minutes before the end of the shift (GC Exh. 9, p. 19).

had requested her to do so. Finally, as I will discuss further below, the Respondent's asserted reasons for discharging Littlejohn are not convincing.

Based on the circumstantial evidence as set forth above, I find that the Respondent, and specifically Touray and Loveridge, had knowledge of Littlejohn's demonstrated support for the Union that he exhibited on February 25. In so finding, I do not credit the testimony of Touray and Loveridge that they had no such knowledge. Based on the circumstantial evidence set forth above, I find such testimony to be implausible based on the record as a whole. In addition, I found that neither Touray nor Loveridge was impressive as a witness. Both witnesses were somewhat evasive on cross-examination. In addition, they both testified, at times, in a way that appeared to be designed to support the Respondent's defense.

Based on the above, I find that the General Counsel has presented a prima facie case under *Wright Line* that the Respondent has discharged Littlejohn for discriminatory reasons.

In its defense, the Respondent contends that the evidence establishes that Littlejohn took an unauthorized break on the evening of February 22, 2013. The Respondent further argues that during this unauthorized break Littlejohn rejected a job and then failed to respond to four pages until he finally accepted a call from his dispatcher and transported the patient before he left work. The Respondent further contends that Littlejohn's actions caused a delay of approximately 30 minutes in moving the patient. The Respondent relies on the instances of discipline administered to transporters discussed above in the section of this decision regarding Oakes' discharge, in contending that it is consistently disciplined transporters for taking unauthorized breaks.

As noted above, I find that Littlejohn was in the restroom experiencing difficulty from approximately 10:45 p.m.to 11:10 p.m. on the evening of February 22, 2013. While the transportation department handbook indicates that a transporter is allowed to be logged out for lunch for 35 minutes, not surprisingly, there are no specific rules regarding the length of time an employee can spend in the restroom. The practice is the transporters go to the restroom during the workday as necessary. As noted above, former dispatcher Bodeck credibly testified that being in the restroom is an acceptable reason for a transporter to fail to immediately respond to a page.

The transportation department handbook also recognizes that transporters have the right to reject an assignment under limited circumstances. The handbook recognizes that transporters have the right to reject the last job before their lunchbreak, but then must log out immediately for lunch after doing so. (GC Exh. 9, p. 15) Obviously, if an employee did not have the right to reject assignments immediately before lunch, on busy days it would be difficult to have a lunch break.In Littlejohn's case, while he rejected an assignment, he did so immediately before entering the restroom, where he remained for approximately 20 to 25 minutes because of the difficulty he was experiencing.

On February 27, Littlejohn's immediate supervisor, Rankin asked him to write a statement about the events of February 22. When Littlejohn asked why he had to write a statement, Rankin responded that there was nothing to worry about but that Touray wanted to get a statement from him. In Littlejohn's written statement he indicated that he was in the bathroom during the time his pager was going off. On February 28, Touray did ask Rankin to find out some additional information from Littlejohn about why he rejected the job initially and Rankin furnished some brief information from Littlejohn regarding the battery falling out of his pickle and and not being able to reach it. Despite being aware that Littlejohn stated that he was in the restroom during the period that he was being paged and the reasons as to why he rejected the job being unclear, Touray did not personally speak to Littlejohn to find out more about the circumstances of his restroom stay. As noted above, I find, based on Littlejohn's trial testimony, that the batteries fell out of his phone while he was in the restroom. I therefore find that Littlejohn's initial rejection of the assignment was not based on the batteries falling out of the phone. I find his trial testimony to be more reliable evidence than Littlejohn's brief statement submitted to Rankin regarding the reasons for his initial rejection of the assignment. Given that Littlejohn indicated in his brief statements during the Respondent's investigation that his restroom stay was the primary reason he failed to respond to the transport assignment in a more timely manner, I find that the Respondent's investigation was somewhat cursory in that it failed to clarify the circumstances surrounding his stay in the restroom. I note that the Board has found an employer's failure to conduct a fair and full investigation and to give employees the opportunity to explain their actions before imposing discipline is a significant factor in finding discriminatory motivation. *Publishers Printing Co*., *Inc*., 317 NLRB 933, 938 (1995) enfd. 106F.3d 41 (6th Cir. 1996).

As noted above, in the discipline authorization form given to Littlejohn regarding his alleged unauthorized break on February 22, 2013, specifically refers to the fact that he was paged four times, and that the last two pages occurred at 10:57 p.m. and 11 p.m. It is undisputed that Littlejohn's shift was scheduled to end at 11:02 p.m. (since he since he clocked in at 3:02 p.m.). The record clearly establishes that transporters are not obligated to answer pages that they receive within 5 minutes of the end of their shift. In fact, Loveridge admitted at the hearing that under the established policy Littlejohn was not required to accept pages within the last 5 minutes of his shift (Tr. 2217). Loveridge claimed, however, that Littlejohn's failure to respond to the first two pages was a sufficient basis for discipline. The fact remains, however, that the Respondent's official document advising Littlejohn of his corrective action and discharge specifically refers to the 10:57 p.m. and 11 p.m. pages that under the Respondent's established policy would not result in any discipline. As noted above, a deviation from past practice when administering discipline supports an inference of unlawful motivation. *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

With regard to the Respondent's contention that Littlejohn's actions caused the delay in the transport of a patient for approximately a half hour, it appears, that there was, in fact, no delay in transporting the patient because Littlejohn's uncontradicted testimony establishes that when he arrived to transport the patient at some time after 11:10 p.m., he had to wait while doctors and nurses finished their chart notes regarding the patient before he could transport the patient.

I find that Littlejohn's willingness to transport the patient when requested by Spirk, even though Littlejohn had already logged out of the Teletracking system, is supportive of the fact that he was not taking an unauthorized break in order to avoid his assigned duties, but rather was justifiably delayed by his necessity to go to the restroom. If Littlejohn was really attempting to avoid work, he could have claimed at that point that he worked 8 hours and had logged out of the system. Instead, Littlejohn completed the assignment Spirk asked him to do and did not request that he be paid overtime for doing so.

The examples of the discipline given to other employees for taking unauthorized breaks does not support the Respondent's discipline of Littlejohn was based on legitimate business considerations for the simple reason that none of them involved employees being disciplined for an unauthorized break while in the restroom. Thus, I find that there is no evidence that the Respondent has disciplined an employee under circumstances similar to those involving Littlejohn.

On the basis of the foregoing, I find that the Respondent has not established that it has consistently and evenly applied its unauthorized break policy to Littlejohn as is required to do so under *Septix Waste*, supra. I therefore find that the Respondent has not produced sufficient evidence under *Wright Line* that it would have discharged Littlejohn for his conduct on February 22, 2013, absent his union activity. Accordingly, I find that the General Counsel has established by a preponderance of the evidence that Littlejohn's discharge violates Section 8(a)(3) and (1) of the Act.

The March 28, 2013 Final Written Warning Issued to Chaney Lewis

The complaint alleges that the Respondent issued a final written warning to Chaney Lewis on March 28, 2013, in violation of Section 8(a)(4), (3), and (1) of the Act.

The complaint also contains 8(a)(1) allegations related to the alleged discriminatory warning given to Lewis on March 28. Paragraph 19 of the complaint alleges that the Respondent, by Ed Keller, interrogated employees by asking him to write a statement about their union membership, activities and sympathies. Paragraph 29 of the complaint of the complaint alleges that on March 28, 2013, the Respondent, by Touray, disparately enforced its policy regarding employee use of bulletin boards by prohibiting employees from posting items in support of the Union.

Facts

The credited testimony of human resources consultant Marina Goodman establishes that on March 20, 2013, she observed Chaney Lewis post what appeared to be a newspaper article on a bulletin board located near a timeclock at the bottom of an escalator in Presbyterian Hospital that was adjacent to the Falk building.[43] Apparently, this article referred to the Union as Lewis was later disciplined for posting "union related materials" on the bulletin board.

Lewis testified that at some time in March 2013, he was approached by his supervisor, Ed Keller, who told him that he had been instructed by Touray to obtain a statement from Lewis because he had been observed posting literature on the bulletin board on the ground floor of Presbyterian Hospital near the walkway to the Falk clinic. When Lewis replied he did not recall doing that, Keller said that it had occurred on the prior Wednesday at 2 p.m. Lewis wrote a statement indicating that he did not recall the incident and gave it to Keller.

On March 26, 2013, a "Corrective Action/Discipline Authorization Form" was prepared by the Respondent indicating that the recommended corrective action for Lewis was a final written warning in lieu of a 3-day suspension. Loveridge's name is typed on the document as the human resources consultant and several management officials, including Touray, signed the document on that date. With respect to the description of the events leading to the discipline, the document states: "On Wednesday, March 20, 2013, Chaney was observed posting union-related materials on the business unit bulletin board at the bottom of the escalators going from PUH to Falk." (GC Exh. 49.)

On March 28, 2013, Supervisor Carolina Clark called Lewis into the transportation department supervisor's office and gave him a final written warning. (GC Exh. 31.) This document states in relevant part: "On Wednesday, March 20, 2013 you were observed posting unauthorized material on a business unit bulletin Board. This is not appropriate and a violation of UPMC Policy HS-HR 0704, Corrective Action and Discharge."

On April 5, 2013, Lewis filed a grievance regarding his final written warning pursuant to the Respondent's internal grievance procedure. In preparation for his grievance meeting, on April 26, 2013, Lewis took a photograph of a bulletin board in the GI breakroom which clearly reflects that non-UPMC materials were posted on it. The postings include restaurant menus, Pittsburgh Steeler tickets for sale, a flyer for a uniform store, and an invitation to a bowling party. (GC Exh. 47.) Lewis credibly testified, without contradiction, that in his movements through the hospital as a transporter he observed many bulletin boards with non-UPMC materials of a similar nature posted on them. He specifically testified that on the bulletin board adjacent to the Falk building he observed signs indicating cars and motorcycles for sale and restaurant menus.

On April 26, 2013, Lewis met with HR representative, Judy Molli, regarding his grievance. Lewis told Mollie that he thought it was unfair that he was being given a write up without the incident being captured on a surveillance camera or having a security officer check his badge to establish a positive identification. Lewis also showed Molli the photograph of the bulletin board in the GI breakroom that he had taken and told her that there were other bulletin boards in the hospital with non-UPMC materials posted on them and that no action had been taken regarding the posting of those materials. Lewis stated

[43] At the trial, Lewis did not specifically deny posting a union literature on the bulletin board in question. Rather, he appeared to question the quality of the evidence against him by referring to previous situations when he posted union literature at the hospital and the Respondent's security force clearly identified him as the individual who posted the literature. Goodman's testimony regarding her observation of Lewis on March 21 posting material on the bulletin board was consistent on both direct and cross-examination and I credit her testimony in this regard.

that the Respondent only enforced the rule prohibiting the posting of literature on bulletin boards with respect to the union literature. Molli said she would look into the situation.

In a letter dated May 6, Molli denied Lewis' internal grievance regarding his final written warning. However, on May 15, 2013, Lewis received the following letter signed by Touray:

> On March 28, 2013 you were issued a Final Written Warning in Lieu of a Three-Day Suspension. This notice is to advise you that effective May 15, 2013, the Final Written Warning in Lieu of a Three-Day Suspension has been expunged from your personnel file and that such Final Written Warning in Lieu of a Three Day Suspension will not be used against you and any future personnel actions.

Analysis

As noted above, on March 26, 2013, Lewis was given a final written warning in lieu of a 3-day suspension. The warning indicates that the basis for it was that Lewis was observed "posting union-related materials" on a bulletin board on March 20, 2013. While Lewis did not testify that he in fact posted union literature on the bulletin board on the date in question, the Respondent clearly believed that he had and disciplined him for doing so. The Board has consistently held that if an employer suspects that an employee has engaged in union activity, even if the employee has not, in fact, done so, the requirement of establishing an employer's knowledge of an employee's union activity is established. *Trader Horn of New Jersey, Inc.* 316 NLRB 194, 198 (1995); *Respond First Aid*, 299 NLRB 167, 169 fn. 13 (1990).

As I previously noted in this decision, *Register Guard I*, 351 NLRB at 1120, makes it clear that when an employee is admittedly disciplined for using an employer's equipment, such as a bulletin board, a *Wright Line* analysis is not appropriate. In the instant case, the warning clearly indicates that the Respondent disciplined Lewis from posting what it believed to be was union related materials on a bulletin board. As I have indicated earlier in this decision entitled "The Alleged Disparate Application of the Respondents Policy Regarding Bulletin Boards," *Register Guard I* sets forth the Board's current analysis regarding allegations of disparate treatment with respect to the posting of union materials on an employer's bulletin board.

As noted in that section of the decision, the Respondent permitted the ESS employee council free use of its bulletin boards at the same time it disciplined Lewis for posting what it believed to be materials supportive of the Union. Under these circumstances, pursuant to the principles set forth in *Register Guard I,* the Respondent has discriminatorily applied its bulletin board policy to employees posting union related materials and has thereby violated Section 8(a)(1) of the Act. By issuing a final written warning to Lewis based upon its disparate application of its bulletin board policy, the Respondent has additionally violated Section 8(a)(3) and (1) of the Act. In finding that the Respondent's conduct also violates Section 8(a)(4) of the Act, I note that the Respondent was aware of the fact that Lewis had participated in proceedings before the NLRB because he was a specifically named in the settlement agreement that resolved the first case between the parties. In this regard, on March 4, Touray and Loveridge met with Lewis to discuss the settlement agreement and the Respondent's new solicitation policy and how it applied to him. At this meeting Touray told Lewis that he could not post any material that was not related to UPMC on any bulletin boards in the facility. By disparately applying its bulletin Board policy to discipline Lewis shortly after this meeting supports a finding that the Respondent was motivated to retaliate against Lewis because of his prior involvement in NLRB processes.

With regard to the complaint allegation that the Respondent violated Section 8(a)(1) by requiring Lewis on March 22 to write a statement about posting literature on the bulletin board, the Respondent contends that it has the right to investigate the circumstances involving potential employee misconduct. The cases relied on by the Respondent, *Manville Forest Products*, 269 NLRB 390 (1984), and *Service Technology Corp*., 196 NLRB 845 (1972), support the proposition that an employer may compel its employees to submit to questioning concerning employee misconduct when the employer's inquiry is still in the investigative stage and a final disciplinary action has not been taken. In those cases, the questions were directed to employees in order to determine whether other employees had engaged in misconduct in violation of plant rules. Here, the Respondent disciplined Lewis admittedly for engaging in union activities under circumstances that I find violative of the Act and the question went directly to the nature of the union activity that the Respondent believed he had engaged in. Thus, I find the instant case presents circumstances that are distinguishable from those present in the cases relied on by the Respondent. Accordingly I find that requiring Lewis to write a statement regarding the union activity that the Respondent believed he engaged in, and then disciplining him for the same conduct constitutes an unlawful interrogation and violates Section 8(a)(1) of the Act.

The April 23, 2013 Final Written Warning Issued to Albert Turner, Turner's June 18, 2013 Discharge and Related 8(a)(1) Allegations

The complaint alleges that the Respondent issued Turner a final written warning on April 23, 2013, and discharged him on June, 18 2013 in violation of Section (8)(a)(3) and (1) of the Act.

The complaint also alleges the Respondent committed following violations of Section 8(a)(1) of the Act for which Turner is the principal witness: about April 15, 2013 Carlton Clark interrogated employees (paragraph 22); on April 15, Tim Nedley demanded to take a photograph of an employee's union button (paragraph 23(a)); in April 2013, Tim Nedley required employees to remove pro union insignia (paragraph 34(d)); and on April 16, 2013, Carlton Clark required employees to remove pro union insignia (paragraph 34(f)).

The 8(a)(1) Allegations Involving Turner

Facts

As noted earlier in this decision, Turner began working for the Respondent when it took over the employee shuttle service in 2010. Turner worked on a split-shift schedule. He would swipe in at 5:40 a.m. and swipe out at 9 a.m. He would then return to work from approximately 1:15 p.m. until 8 p.m. After

the Respondent assumed responsibility for the transit department, Turner's immediate supervisors were Carlton Clark and Ted Hill. Bart Wyss was then the Respondent's operations manager for employee transit. Wyss reported directly to Tim Nedley the Respondent's 'senior director of materials management. The human resources consultant assigned to the employee transit department was Shannon Corcoran

Turner testified that after he became involved in the Union's campaign in 2012 he wore the union pin that stated "Make It Our UPMC." He also wore a lanyard with the Union's logo that also stated "Make it our UPMC." In 2013, he also put the same union pin and the union sticker indicating "We're With Ron" on his lunch bag that he took to work daily. Turner placed the lunch bag on the console next to his driver's seat in the shuttle bus where it could be viewed by passengers coming onto the bus. Since Turner began working for the Respondent in 2012 he observed other employees wear pins on their uniforms that were not provided by the Respondent. In this connection, Turner recalled one driver who wore a four leaf clover pin around St. Patrick's Day. Turner wore a Pittsburgh Steelers pin during the football season in the presence of Supervisors Bert Wyss, Ted Hill, and Carlton Clark. No supervisor ever told him he could not wear his Pittsburgh Steelers pin.

In the beginning of 2013, Turner also posted flyers in support of the Union on the bulletin board in the trailer where the drivers swiped in and out of work and placed flyers on the table located in the trailer. The union flyers would be taken down from the bulletin board and removed from the table within a day or 2 but Turner never observed who removed them. [44] Turner observed nonhospital materials posted on this bulletin board. He recalled that in the fall of 2012 and employee post information on the bulletin board regarding a trip to the garment district in New York City. That notice was posted for about 2 weeks but management then asked the employee to take it down. Turner posted on that bulletin board a flyer he was given by the Union regarding a 5K race to see how long it would stay up. The poster stayed up for about 2 weeks before it was taken down. On cross-examination, Turner admitted there was, in fact, no 5K race. Turner also recalled information being posted on the bulletin board regarding the funeral arrangements for the wife of one of the drivers.

In February 2013, Turner also placed some union flyers on his shuttle bus. Turner testified that he did so after observing that the Respondent had posted a flyer on the bus indicating opposition to the Union (GC Exh. 10). He also observed another shuttle bus driver had posted a Philadelphia Eagles' flyer on his shuttle bus.

Clark testified that in February 2013, he told Turner that Turner should not be wearing his union pin and that the only pins that were permitted were "recognition" pins regarding service provided to the Respondent. Clark made a note of his conversation with Turner which establishes the date of the conversation was February 11, 2013 (CP Exh. 33). Clark's note regarding February 11, reflects the following: "I had a conversation with Al instructing him that he was not to distribute the union flyers, and the only pins allowed were for recognition of accomplishments." Clark's note also indicates the following with respect to a conversation he had with Turner on February 12: "Ted Hill and I talked to Albert Turner at approximately 4:00 PM and instructed him that he was not to post or distribute any non-UPMC information including Union articles on UPMC property, including the bus. I informed him that any further postings or distribution of union information on company time would be considered insubordination."[45]

Although instructed not to do so by Clark in February 2013, Turner continued to wear his union pin. On April 11, Lisa Stanicar, one of the Respondent's managers, sent an email to Hrivnak, the human resources director, reporting that she had seen union flyers on the bus that Turner was driving. She also reported seeing Turner wearing a union pin on his ID badge and the "We're with Ron" sticker on a bag sitting beside the driver's seat. That same day, Hrivnak forwarded Stanicar's email to Wyss. After receiving this report, Wyss obtained permission from Nedley to have transportation department employee Gary Sargent ride Turner's shuttle bus in order to investigate the matter.

On April 15, 2013, Turner was wearing his ID badge with his "Make It Our UPMC" pin right above it. Sargent rode Turner's bus as a passenger to verify that he was wearing his union pin. After exiting Turner's bus, Sargent approached Turner while he was stopped and picking up passengers and asked to take a picture of his name tag. Turner initially refused but when Sargent told him that he worked for Bart Wyss, Turner consented to have his picture taken. Sargent then photographed Turner wearing his union pin.

After receiving Sargent's report that Turner was wearing his union pin, that same day Wyss directed Clark to obtain statements from Turner as to why he was continuing to wear his union pin. Clark and Sargent waited in a car for Turner's bus to arrive at the Respondent's parking lot on Swineburn Street.

[44] Keith Lewis, a former supervisor in the Respondent's transit department, testified on behalf of the General Counsel pursuant to a subpoena. Lewis credibly testified that he removed the flyers from the trailer pursuant to instructions from Wyss. Lewis also testified that Wyss told him that that Turner, "the ringleader" of organizing, had placed the flyers in the trailer. (Tr. 1130–1131.) While Lewis testified that he recalls this occurring in March through April 2012, the record as a whole convinces me that he was mistaken as to the date and that Lewis removed the union literature from the trailer in March or April 2013.

[45] There are no complaint allegations regarding Turner's distribution of union flyers on his shuttle bus and accordingly I make no findings regarding that issue. While the General Counsel acknowledges that there are no specific complaint allegations regarding Clark's directive to Turner on February 11 and 12 regarding the distribution of literature and the wearing of union insignia, in his brief the General Counsel claims that Clark's statements constitute violations of Sec. 8(a)(1). As I noted earlier in this decision, I will not make any findings of unfair labor practices with regard to matters that that were not specifically alleged as complaint allegations prior to the General Counsel closing of his case in chief. I note, moreover, that additional findings regarding these matters would be cumulative as I find in this decision that the Respondent has committed other unfair labor practices regarding those issues. I have, however, considered this evidence as background to the specific unfair labor practices involving Turner alleged in the complaint.

There were no passengers on Turner's bus as he drove up the ramp and entered the parking lot. As he was entering the lot, Turner's cell phone rang and he answered the phone. Clark and Sargent observed Turner using his cell phone. After Turner parked his bus, Clark and Sargent approached Turner's bus. Clark entered Turner's bus and asked Turner to provide a statement as to why he continued to wear his union pin. After initially refusing, Turner wrote a statement that indicated, "I wear the button because I like UPMC." (GC Exh. 172.) According to Turner's credited testimony, after Clark had obtained the statement from Turner, Clark told him, "You're not allowed to talk on your cell phone while driving." (Tr. 962.) Clark forwarded Turner's statement to Wyss by email. Clark also submitted to Wyss three reports he prepared regarding this incident (GC Exhs. 19, 21 and CP Exh. 31.)

At 10 a.m. on the morning of April 15, Clark received a voice mail message from Turner asking him to return Turner's call. When Clark returned the call, Turner asked Clark if he was going to be written up for wearing his union pin on his ID badge. Clark informed him that the matter was being investigated and he could not be sure what would happen. Turner told Clark he would no longer wear his union pin.

Turner testified that on the morning of April 16, he pulled his bus up to the shelter in the south parking lot and Tim Nedley entered the bus and said, "Let me get a picture of that button." Turner then looked out and saw a "Make It Our UPMC" pin on his vest. Turner testified that he had forgotten the pin was on the vest when he put it on that morning. After Nedley's statement, Turner took the union pin off and told Nedley that he had called Clark the day before and told him he would take all the union pins off but he had forgotten that one. Nedley said, "okay" and left the bus without taking a picture of Turner.

Later that morning, another driver, Williams, told Turner that Clark wanted Turner to go with him somewhere so that Williams was going to run Turner's route. Clark drove Turner to one of the Respondent's offices located nearby. When Turner arrived in the office, Nedley was present and handed Turner a note pad and instructed him to write a statement as to why he was still wearing his union pin. Turner dutifully wrote the statement that indicated: "I had forgotten I had a pin on my vest when I put it on this morning," (GC Exh. 171) and gave the statement to Nedley. Turner testified that during this meeting he was also wearing a union lanyard that had the legend "Make It Our UPMC" on it. Nedley told Clark to get Turner a UPMC lanyard but that Clark did not do so.

Clark's testimony confirms that of Turner in material respects with respect to this incident. Clark testified that on April 16, 2013, Turner was at the Respondent's south side distribution center when Tim Nedley asked Clark to bring Turner to meet with him. Nedley had been meeting with busdrivers at the facility and had observed Turner wearing his union pin and informed Clark that he wanted to meet with Turner about wearing his union pin. Clark then brought Turner to meet with Nedley.

Analysis

With respect to the complaint allegation that on April 15, the Respondent demanded to take a photograph of an employee's union button in violation of Section 8(a)(1), Sargent first demanded that Turner consent to have his photograph taken and then in fact photographed Turner wearing his union pin. The Board has long held that the photographing of employees engaged in protected concerted activities, absent proper justification, has a tendency to intimidate employees and thus violates the Act. *F. W. Woolworth Co*., 310 NLRB 1197 (1993); *Waco, Inc*., 273 NLRB 746, 747 (1984). In the instant case, Turner was engaging in his protected right to wear union insignia while driving his bus. It is undisputed that Turner's work as a busdriver never requires him to enter into a patient care areas and the Respondent has produced absolutely no evidence that there are "special circumstances" that would privilege it to restrict Turner's right to wear his union insignia at work. Accordingly, there is no evidence that the Respondent had any legitimate justification for photographing Turner while he was wearing his union insignia. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act by demanding that Turner consent to have his photograph taken and by photographing him wearing his union insignia.

As noted above, on April 15, Wyss directed Clark to obtain a statement from Turner as to why he was continuing to wear his union pin. Pursuant to these instructions Clark asked Turner to provide a statement as to why he continued to wear his union pin. Applying the factors set forth in *Rossmore House*, *Scheid Electric,* and *Intertape Polymer*, supra, I find that Clark's interrogation as to the subjective reasons as to why Turner continued to wear his union pin constitutes a violation of Section 8(a)(1). In so finding, I rely particularly on the history of employer hostility to the union activities of its nonclinical support staff employees and specifically the hostility demonstrated to the union activities of Turner. In addition, I can see no legitimate basis for the Respondent to inquire as to the subjective reasons that Turner continued to wear his union pin.

As described in detail above, the complaint also alleges that on two occasions on or about April 16, 2013, the Respondent required employees to remove pro union insignia. In the first incident, on April 15, after Turner was unlawfully photographed while wearing his union pin and interrogated as to the reasons he was continuing to wear it, Turner called Clark and asked him if he was going to be written up for wearing his union pin. Clark informed him that the matter was being investigated and that he could not be sure what would happen. Turner then told Clark he would no longer wear his union pin. Occurring in the context of the unlawful photographing and interrogation, Clark's response to Turner's question can only be construed as an implicit demand to take the pin off.

The next day, April 16, when Nedley observed Turner wearing his union pin, Nedley said he wanted to get a picture of that button. Turner immediately took the pin off and told Nedley that he had called Clark the day before and told him that he would not wear any more union pins, but he had forgotten that one. Wanting to drive home the point that the Respondent would not tolerate Turner wearing any union insignia, Nedley instructed Clark to bring Turner to his office. Once again, the Respondent, this time by Nedley, directed Turner to write a statement about why he was continuing to wear his union in-

signia. Under the circumstances, it is clear that the Respondent's actions, through Clark and Nedley, constituted an implicit demand that Turner was to remove his union insignia and not wear it again. Accordingly, I find that on April 15 and 16, the Respondent compelled Turner to remove his union insignia and that such conduct violated Section 8(a)(1) of the Act.

Turner's Final Warning and Discharge

Facts

On April 23, 2013, Clark and Hill approached Turner's bus as he was completing a route. Turner testified that Clark and Hill came onto the bus and that Clark gave him a final written warning (GC Exh. 24) which indicated in relevant part:

> You are receiving a final written warning for safety violation.
>
> On September 28, 2012, you received a written warning for safety violation.
>
> On April 15, 2013, you were witnessed with your cell phone to your ear operating a shuttle bus. On December 27, 2011 you signed the cell phone and electronic devices policy which outlines the U.S. Department of Transportation's rule prohibiting commercial drivers from using a hand-held mobile telephone while operating a commercial bus or truck. This is also an Employee Transportation department policy.

After Turner read the final written warning, he asked Clark whether he should have received a verbal warning but Clark replied that an employee did not get a verbal warning for safety violation.

As noted above, on April 15, when Clark was securing a statement from Turner about why he was continuing to wear his union button, Clark told him that operating a company vehicle while using the cell phone was a violation of company policy. Turner credibly testified that from April 15 until he was given his final written warning on April 23, no one in management had spoken to him about his use of his cell phone on that date.

On June 18, 2013, Hill told Turner that Clark wanted to see him in Clark's office. Hill drove Turner over to meet with Clark in a commercial passenger that Hill normally used in the performance of his duties. When Turner arrived at Clark's office, Clark presented Turner with a termination notice. (GC Exh. 25.) The termination notice states, in relevant part:

> On April 23, 2013, you received the final written warning for a safety violation.
>
> To date, you have obtained 7 tardiness occurrences for the departments (sic) SCM Distribution and Materials Management tardiness policy. Per this policy, you moved to the next step in the corrective action process.

The termination notice then listed 7 occurrence dates from December 10, 2012, through June 7, 2013, when Turner had missed a punch.

According to Turner's credited testimony, he told Clark this occurred because he supported the Union and Clark did not respond. After the discharge meeting was over, Hill drove Turner back to where Turner's car was located. Hill was driving the commercial passenger van that he normally used in his duties. According to Turner's credited testimony, Hill stated "I do not believe it" and added "they should tell me when they are going to fire somebody." At that point, Hill's cell phone rang and he answered it. While Turner could not hear the other speaker, he heard Hill speaking to the caller about a about a bus route. (Tr. 979.)

The UPMC Supply Chain Management-Distribution and Materials Management Tardiness Policy (the tardiness policy) applies to employees in the Respondent's transit department. (R. Exh. 17.) According to the tardiness policy the definition of "occurrence" is as follows:

> 1. A missed punch in Kronos (any occasion when there is no confirmed time Swipe in Kronos)
> 2. Swiping in late (tardiness).
> 3 Swiping in early without prior supervisory approval.
> 4. Swiping in early or late without prior supervisory approval.

According to the progressive discipline provision of the policy, employees are disciplined for accrued occurrences accumulating within a rolling12-month period as follows: For the first four occurrences, there is no disciplinary action. For the fifth occurrence a verbal warning is given. For the sixth occurrence there is no disciplinary action. For the seventh occurrence a written warning is given. For the eighth occurrence a final written warning in lieu of suspension is given. For the ninth occurrence an employee is discharged.

The uncontroverted testimony of the Respondent's human relations director, Sheila Heckla, establishes that although the tardiness policy provides that an employee that with nine occurrences will be discharged, the level of discipline may be accelerated if the employee has received other discipline under the Respondent's Corrective Action and Discharge Policy. (GC Exh. 161.) Thus, if an employee has reached the final written warning level of discipline, a single, subsequent violation of any Respondent policy, including the tardiness policy, may result in termination. The final written warning given to Turner (GC Exh. 24) indicates that "a violation of any UPMC or department policy shall result in further corrective action, up to and including termination of employment."

Analysis

Initially, I note that the complaint alleges that the final written warning issued to Turner and his discharge are discriminatorily motivated, but there are no other complaint allegations regarding other discipline issued to Turner.

In analyzing the circumstances of Turner's final written warning and discharge under *Wright Line* is clear that Turner was openly active on behalf of the Union and that all of the Respondent's supervisors in the transit department were aware of his support for the Union. In fact, the credited testimony of former Supervisor Keith Lewis establishes that Wyss referred to Turner as a Union "ringleader." As I have noted previously in this decision, the Respondent has exhibited substantial animosity toward the Union's attempt to organize its nonclinical support employees through its commission of multiple unfair labor practices. In addition, however, the Respondent exhibited substantial animus toward the union activities of Turner. After Turner refused to acquiesce in Clark's February 2013 directive to not wear any union insignia at work, in April 2013, the trans-

it department supervisors launched a campaign against Turner to ensure that he complied with their demand that he stop wearing union insignia. In this regard, in April 2013, Turner was unlawfully photographed while wearing his insignia, unlawfully interrogated as to why he continued to wear it, and was subject to implicit demands on two occasions that he remove his union insignia. Faced with this onslaught of unlawful activity, Turner finally stopped wearing his union pin on April 16. On the basis of the foregoing, I find that the General Counsel has established under *Wright Line,* supra, that Turner's union activity was a motivating factor in the employer's decision to give him a final warning and discharge him. Accordingly, the burden shifts to the Respondent to show that it would have taken the same action against Turner in the absence of his union activities.

As I noted previously in this decision, in order to meet its *Wright Line* burden, the Respondent must establish that it has applied its disciplinary rules consistently and evenly. *DHL Express,* 360 NLRB 730, 736 (2014). In support of its defense with respect to Turner's alleged discriminatory final warning for using his cell phone while driving his shuttle bus, the Respondent notes that on March 27, 2013, employee Janell Saban received a written warning for using her cell phone while driving her shuttle bus. (GC Exh. 30.) The warning indicates that Saban admitted to answering her phone while her bus was in operation and passengers were on board. The warning does not indicate that Sabin had received any prior discipline. The Respondent contends that Saban was given a written warning because that is the appropriate first step of discipline for safety violation. The Respondent's corrective action policy indicates that the violation of a safety rule, depending on the circumstances, may be appropriate for written warning without prior counseling. (GC Exh. 161, p. 2.)

After Turner was issued his final written warning for using his cell phone while driving his bus, the Respondent issued two other written warnings to employees for cell phone usage while driving. While this evidence is relevant, since it occurred after the discipline issued to Turner, I assign it less weight than the evidence regarding the Respondent's practice with respect to this issue prior to the discipline issued to Turner. On October 14, 2013, the Respondent issued a written warning to David Byers. (R. Exh. 322.) Byers' warning reflects that he was observed by his supervisor using his cell phone while operating a shuttle bus and that he admitted to using the phone while the bus was in operation. Finally, on November 21, Richard Tyree was issued a written warning for using his cell phone while operating his shuttle bus. Tyree admitted using the phone while his bus was in operation. (R. Exh. 323.) Clark testified that both Byers and Tyree were driving on public roads when they were observed using their cell phones.

The General Counsel and the Union contend that the Respondent has disparately applied its policy regarding the issuance of warnings to employees for cell phone usage. In this connection, Clark testified that he had received a report from a dispatcher Nancy McCracken that employee Marilyn Showater used her cell phone while operating a shuttle bus. Clark further testified that he spoke to Showater and that while she did not admit to using her cell phone, he told her she should not be using her cell phone while driving a bus. (Tr. 2602–2603.) Showater was not issued any discipline for this incident. I also credit Keith Lewis's testimony that he observed Showater's cell phone use while driving and reported it to both Hill and Clark. (Tr. 1135–1136.) According to the portion of Lewis' pretrial affidavit that was read into the record by Respondent's counsel, Showater was driving through the parking lot near the garage when she was observed on her cell phone. (Tr. 1138.)

The General Counsel and the Union also contend that the Respondent has not applied to supervisors its policy of issuing discipline to individuals who use cell phones while driving. On its face, the UPMC cell phone and electronic devices policy (R. Exh. 12) applies to all of the individuals employed in the Respondent's employee transit department. In fact, Wyss specifically admitted that it applied to both supervisors and employees (Tr. 2536). I find, based on Turner's credited testimony, that he observed Supervisor Hill frequently using the cell phone while Hill was driving the commercial van he utilized in the performance of his duties. (Tr. 973.)

As I have noted above, former Supervisor Keith Lewis testified on behalf of the General Counsel.[46] Lewis testified regarding a specific incident when he spoke to Wyss while Lewis was on his cell phone driving one of the Respondent's trucks. Lewis and Clark were driving to an accident scene when Wyss called Lewis on his cell phone. When Lewis answered, Wyss asked him why he was answering the phone while he was in his truck, as he was not allowed to do so. Lewis responded, "I only answer this phone for two people. My bosses, one is you and one is my wife." Wyss then asked Lewis where he was going and details of the accident he was investigating (Tr. 1126–1128.) Lewis testified he received no discipline for this incident. Lewis also testified that he observed Hill on his cell phone while driving one of the Respondent's vehicles approximately three times a week. Lewis testified that, while he could not recall specific dates, he mentioned to Wyss on several occasions that he observed Hill using his cell phone while driving (Tr. 1134.)

Wyss denied talking with Lewis on his cell phone while Lewis was driving (Tr. 2134) Wyss recalled an incident when he spoke on the phone with Lewis and asked him if he was driving but Lewis answered that he was not. Wyss further testified that all individuals who were observed using the cell phone while driving had been counseled or disciplined.

I credit Lewis with respect to the conflict in the testimony between Lewis and Wyss. Lewis' testimony was detailed and his demeanor reflected that he distinctly recalled the events that he testified about. I do not think the fact that Lewis had been discharged by the Respondent motivated him to give false testimony. I could detect no animosity toward the Respondent with regard to the manner in which Lewis answered questions on both direct and cross-examination. On the other hand, Wyss testified regarding these issues in a somewhat perfunctory

[46] Lewis was employed by the Respondent as the fleet supervisor. He supervised the six mechanics that were responsible for maintaining the vehicles used in the Respondent's transit department. Lewis was employed from September 6, 2011, to July 10, 2013, when he was discharged for directing an employee to operate a vehicle with an expired inspection sticker.

manner and without much detail. On balance, I find that the testimony of Lewis is the more reliable version.

In further assessing the Respondent's defense, I also note that the Respondent conducted no investigation into the circumstances surrounding Turner receiving a cell phone call as he entered the parking lot from the entrance ramp. Despite the Respondent's marked propensity to obtain a written statement from an employee under investigation for possible discipline, Turner was never asked to provide a written statement to explain why he had answered his cell phone. This failure to give Turner any opportunity to explain his conduct before issuing a final warning is in marked contrast to the extensive investigation that was directed toward Turner's union activity during the period surrounding April 15. On April 15, when Clark and Sargent observed Turner on his cell phone, they were at the parking lot to secure a statement from him about why he continued to wear his union pin. When Turner called Clark to ask whether he would be written up for wearing his union pin, Clark informed him that there was an investigation pending and he was not sure what would happen. The next day, after Nedley observed Turner still wearing his union button, Nedley compelled Turner to come to his office and Turner was required to give another written statement explaining why he was still wearing union insignia. During this entire period of investigating Turner's union activity, there was no mention made of his cell phone use. Under the circumstances, I find that the Respondent's lack of investigation into the circumstances surrounding Turner's cell phone usage is indicative of a discriminatory motive with respect to the written warning he was given. *Publishers Printing Co*., supra.

After considering all the foregoing, I have concluded that the Respondent has not met its burden under *Wright Line* of establishing that it would have given Turner a final written warning for his cell phone usage, absent his union activity. While the Respondent has issued a written warnings to three employees for engaging in cell phone usage, only one of those employees, Saban, was disciplined prior to the final written warning given to Turner. In addition, Saban was talking on her cell phone while passengers were on her bus. The written warnings issued to employees Byers and Tyree both occurred several months after the final written warning issued to Turner. I also note in both instances, these employees were driving their bus on a public road when they were observed on their cell phone.

As noted above, employee Marilyn Showater was merely given a verbal counseling when it was reported by both a dispatcher and supervisor Lewis that she was observed on her cell phone while in a parking lot near the garage. While the testimony did not establish the date of this occurrence, since Lewis testified he observed it, it occurred prior to July 2013, when Lewis was discharged. Since there is no evidence that Showater had any employees on her bus and was observed on her cell phone while in a parking lot, I find that the situation regarding her cell phone use while driving is comparable to that of Turner.

I also find Turner's credited testimony establishes that he observed Hill talking on his cell phone while driving on numerous occasions. The credited testimony of Keith Lewis establishes that while Lewis was driving one of the Respondent's trucks, he had a cell phone conversation with Wyss, under circumstances which establish that Wyss knew that Lewis was driving. In addition, Clark was present with Lewis when this conversation occurred. I also find that that Lewis informed Wyss on several occasions that he observed Hill using his cell phone while driving a company vehicle. There is no evidence that Lewis or Hill were ever disciplined for their cell phone usage while driving. I note that the Board has held that failing to discipline a supervisor for engaging in similar conduct for which an employee is disciplined, is evidence of disparate treatment. *Manimark Corp*., 307 NLRB 1059 (1992), enf. denied 7 F.3d 547 (6th Cir. 1993).

After considering all the foregoing, I find that the Respondent has not met its burden of showing that it has consistently and evenly applied its policy regarding the discipline administered to employees for the use of a cell phone while driving. Accordingly, I find that the Respondent has not met its burden under *Wright Line* to establish that it would have given Turner a final written warning absent his union activity. Accordingly, I find that Turner's final written warning violates Section 8(a)(3) and (1) of the Act. Because Turner's final written warning was unlawful I find that the Respondent was not privileged to rely on it to accelerate Turner's discipline to the discharge level under its progressive disciplinary policy. As noted above, Turner had received seven occurrences under the tardiness policy and it requires nine occurrences for an employee to reach the discharge level under that policy. By relying on the discriminatorily motivated final warning to accelerate Turner to the discharge level under its progressive discipline policy, the Respondent's discharge of Turner also violates Section 8(a)(3) and (1) of the Act.

The Allegations Regarding James Staus

James Staus was the principal General Counsel witness in support of the following complaint allegations alleging that the Respondent violated Section 8(a)(1) of the Act. Paragraph 9 of the complaint alleges that in February 2013, the Respondent, by Ryan Beaver impliedly threatened its employees because of their union activities. Paragraph 21 of the complaint alleges that on April 3, 2013, the Respondent, by Beaver, interrogated its employees about their union membership. Paragraph 31 of the complaint alleges that the Respondent, by Ryan Beaver and Paul Ondo, disparately applied the Respondent's solicitation policy to employees who supported the Union. Finally, paragraph 25 alleges that on April 26, the Respondent, by Paul Ondo, interrogated employees about their union membership.

The complaint also alleges that the Respondent issued verbal warnings to James Staus on April 4 and 26, 2013, placed Staus on a performance improvement plan (PIP) on May 14, 2013 and discharged him on July 1, 2013, in violation of Section 8(a)(3) and (1) of the Act.

Background

The Respondent has a department known as supply chain, which includes various divisions such as employee transit, contracting, moving and storage, and central supply and distribution. Central supply and distribution involves the moving and maintenance of medical supplies. The supply chain department is responsible for the supply rooms, which are also referred to

as PAR locations that are located within clinical areas of the hospital. PAR stands for "preferred amount of reorder." A PAR level is a threshold amount of a given product that is determined by a computer. A minimum par is 6 days worth of product. PAR levels are reevaluated every 3 months to 6 months. This is referred to as a PAR reset. The supply rooms are maintained by supply specialists. Each supply specialist is assigned to specific supply rooms. Supply specialist have the following primary duties: ordering products, stocking products, rotating supplies, and maintaining the cleanliness of supply rooms.[47] Supply specialists at Presbyterian Hospital work from approximately 5 a.m. until 1 p.m., Monday through Friday.

In early 2013, Ryan Beaver, a senior materials manager, and Paul Ondo, a supervisor, were assigned to supervise the supply specialists at Presbyterian Hospital.[48] There were 12 supply specialists at Presbyterian Hospital who reported to Ondo and Beaver and these employees supplied 87 supply rooms. The supply specialists who supplied the operating room supply rooms reported to another manager.

In January 2013, Beaver and Ondo began rearranging the 87 supply rooms they were responsible for in a process referred to as "PAR rebuilds." A PAR rebuild involves rearranging the manner in which materials are stored in a way that is deemed to be more efficient. This process ended in approximately the middle of March 2013. After the PAR rebuilds were complete, Beaver and Ondo changed the department's ordering system. Prior to this time the supply chain department in Presbyterian Hospital used a same day ordering system in which products arrived the day after it was ordered. Presbyterian Hospital was the only hospital in the UPMC system using the same day method of ordering. Beaver and Ondo instituted a next day ordering system in which products are received 2 days after they are ordered. However, some units, such as intensive care units and emergency rooms continued to be ordered on an everyday basis.

Clinical employees constantly go into supply rooms throughout the day to obtain needed supplies. At times, employees from one unit will go to the supply room in another unit to obtain supplies if the supply room in their unit does not have what is needed. As noted above, supply specialists are finished with their work at approximately 1 p.m. and consequently do not see their assigned supply rooms until the next morning.

The February 2013 8(a)(1) Allegation

James Staus began to work as a supply specialist for the Respondent in 2006 at Presbyterian Shadyside hospital. In 2012 Staus began to openly support the Union. In this connection, he wore a pin indicating "Make It Our UPMC" and placed union literature in the loading dock area of the hospital and in the supply specialist locker room.

From the time he was hired in 2006 until he went on medical leave in December 2012, for knee surgery, Staus did not have permanent assignment regarding the supply closets he was responsible for. Rather, he was a "floater" and filled in for supply specialists that were absent or on vacation. From the time he began working for the Respondent until 2013, Staus had not been disciplined or counseled for his job performance. His evaluations for the period from 2006 through 2008 indicate generally that he met or exceeded the requirements of his position (GC Exhs. 104, 105, and 106). His evaluations for the period from July 2010 to July 2011 (GC Exh. 183) and July 2011 to July 2012 (GC Exh. 184) indicate indicates that overall he was rated as a "Solid, Strong, Good Performer."

When Staus returned from his medical leave on February 13, 2013, he was assigned for the first time the task of attending to specific supply closets. Staus was assigned nine supply rooms, a number consistent with those serviced by the other supply specialists. At this time Staus was the only one of the 12 supply specialist to openly support the Union.

According to Staus's uncontradicted testimony, shortly after his return to work in February 2013, he attended a meeting with the other supply specialists and Beaver and Ondo. Staus was wearing his union button that indicated "Make It Our UPMC." Beaver asked Staus whether he was "going to continue to put up the union stuff." (Tr. 1231.) Staus replied, "Yes. It's my right." Beaver then indicated that Staus did not need a union as it "takes all your money in union dues and people hate it." Beaver added that a person he knows who is in a union received only a 3 percent raise last year. Staus replied that he had received only a 2 percent raise. Although Beaver and Ondo testified at the hearing, they did not testify regarding this conversation.

I find that Beaver's statement to Staus in the presence of other employees that he did not need a union, as a union takes all your money in union dues and people hate it, is not an implied threat that violates Section 8(a)(1). Beaver's statement regarding the payment of dues reflects the economic reality that unions collect dues from employees they represent. The statement does not convey any implicit threat of reprisal against employees for selecting a union. *Office Depot*, 330 NLRB 640, 642 (2000). The portion of the statement indicating that Staus did not need a union and that "people" hate having dues deducted is not a threat but merely an expression of opinion that is protected by Section 8(c) of the Act. Accordingly, I shall dismiss this allegation in the complaint.

The 8(a)(3) Allegations and the April 2013 8(a)(1) Allegations Regarding Staus

Facts

On April 3, 2013, Staus was wearing on his uniform a "We're with Ron" sticker that he had been given by the Union. Beaver saw the sticker and asked Staus if he was "coming out." Staus replied "no", it's for Ron Oakes who had been fired twice. Beaver asked him if it was a union thing and Staus replied that it's a grass roots union effort to get Oakes' job back because he was fired under a policy that nobody has followed before or since and that his firing was illegal in the view of

[47] The Respondent is monitored by various regulatory agencies including the Department of Health which monitor standards governing supply operations. These standards include that products must be stored 6 inches above the ground and 18 inches away from the ceiling, and may not be expired.

[48] Beaver also had supervisory responsibility for approximately 11 facilities affiliated with UPMC and supervised altogether approximately 120 employees.

union supporters. Later that same day, Staus saw Beaver again and told him that Staus did not appreciate that Beaver had called his sexuality into question. Beaver asked Staus what he was talking about as Beaver did not understand what Staus meant. Staus stated that Beaver said that he was "coming out." Beaver said that if he had offended Staus, he was sorry.

On April 4, Ondo paged Staus to meet him on the loading dock. When Staus arrived both Beaver and Ondo were present. Beaver told Staus that he had to write him up because Beaver had talked to HR earlier that day and that he had to verbally warn him about his "We're With Ron" sticker and his "Make It Our UPMC" button. Beaver handed Staus a verbal warning dated April 4, 2013 and signed by Beaver (GC Exh. 185), which stated the following:

> James Staus received a verbal warning from Ryan Beaver, Senior Manager, Materials Management, due to wearing the stickers and buttons on his uniform that were not approved under UPMC policy.
>
> They were:
>
> A sticker that said "We're with Ron" and "Make it our UPMC"
>
> Management expects James Staus to take advantage of this verbal warning. He was informed that any further violations of hospital/department policy will result in a next step in the corrective action process.

Staus credibly testified that from his return to work in February 2013 through April 2013 he observed employees working in the same areas as he did wearing lanyards and buttons that were not related to the Respondent. In this connection, Staus regularly observed employees wearing lanyards and pins displaying support for the Pittsburgh Steelers, Penguins and Pirates. Staus had a Pittsburgh Penguin's lanyard that hung out of his pocket and was attached to his work keys. Staus also saw an employee with a lanyard that indicated "Zoo Med" although he testified he did not know what that referred to.

In June 2013, Ondo approached Staus at work and told him that the verbal warning he received on April 4 was being rescinded. When Staus asked why Ondo merely walked away without answering him. In this regard, the Respondent's human resources department issued a memorandum to Staus, dated June 21, 2013, and signed by both Staus and Ondo which indicates that the verbal warning that Staus received on April 4, 2013, for wearing union buttons and stickers on his uniform was rescinded from his file. (GC Exh. 186.)

For the reasons expressed above in section of this decision entitled "The Alleged Disparate Enforcement of the Solicitation Policy Regarding Union Insignia" I find that Respondent applied its solicitation policy in a disparate manner by barring employees from wearing union insignia at work while permitting employees to wear other nonofficial insignia. Accordingly, I find that the verbal warning given to Staus on April 4, 2013, violates Section 8 (a)(3) and (1) of the Act. I also find that by asking Staus if he was "coming out" after observing him wearing his union sticker and pin, Beaver unlawfully interrogated Staus under the standards set forth in *Rossmore House*, *Scheid Electric* and *Intertape Polymer Corp.,* supra. While by that point, Staus was an open and known union adherent, the answer to the question that Beaver asked Staus about his union sticker and pin was used by the Respondent to give Staus a discriminatory warning. Accordingly, I find that the Respondent, violated Section 8(a)(1) of the Act by unlawfully interrogating Staus regarding his union activity.

According to the testimony of Staus, in April 2013 he placed union literature in the employee break room and on a table in the dock area where supply specialists swiped in for their shift. Ondo testified that in April 2013 he observed union materials placed on the table in the employee break room. Ondo also testified that he observed union materials posted in a bulletin board in the dock area where employees swiped in and also on the refrigerator in the break room. The testimony of both Staus and Ondo regarding this issue was brief. During his testimony, Staus did not deny posting union materials on the bulletin board and on the refrigeration. While I did not find Ondo to generally be a credible witness, I credit his testimony on this issue as it is corroborated by the language of the warning given to Staus on April 3.. I also note that Staus did not specifically deny posting union materials on the bulletin board in the dock area and on the refrigerator. Accordingly, I find that Staus placed union literature on tables in both the employee break room and in the dock area where employees swiped in. I also find that he posted union material in the bulletin board in the dock area and on the refrigerator in the break room.

On April 26, Ondo asked Staus if he had distributed union literature. Staus indicated that he had and stated that it was his right to do so. Ondo told him that it was against company policy and that he would have to write him up for it. Staus testified that he did not receive anything in writing regarding this incident. A document subpoenaed by the General Counsel and introduced into evidence further establishes that on April 26, 2013, Staus received a verbal warning from Ondo "due to posting union materials in the employee break room and on the dock at Presbyterian Hospital that were not approved under UPMC policy." (GC Exh. 110.)

Staus' testimony establishes that he placed union literature in nonworking areas and Ondo specifically admitted that he observed union materials placed on the table in the employee break room. There is no evidence that Staus distributed union materials during working hours. The Board has long held that employees have a Section 7 right to distribute union literature during nonworking time in nonworking areas of an employer's premises. *Stoddard -Quirk Mfg. Co*. 138 NLRB 615, 621 (1962); *St. John's Hospital*, 222 NLRB 1150 (1976,) enfd. in part 557 F.2d 1368 (10th Cir. 1977); *Hale Nani Rehabilitation*, 326 NLRB 335 (1998). While the warning given to Staus on April 26, 2013, indicates that it was given to him because he had "posted" union materials in the employee break room, Ondo's testimony establishes that the Respondent was also aware that union material was distributed in the employee break room. Since the employee break room is clearly a nonworking area, the warning given to Staus is discriminatory and violates

Section 8(a)(3) and (1) of the Act.[49] The fact that Staus also posted union literature on the bulletin board in the dock area and on the refrigerator in the break room does not privilege the Respondent to issue him a warning for that conduct. As I have noted above in the section of this decision entitled "Alleged Disparate Application of the Respondent's Policy Regarding Bulletin Boards," the Respondent has maintained a discriminatory policy with regard to the posting of union materials on bulletin boards. Accordingly, the warning given to Staus on April 26, 2013, is also violative of Section 8(a)(3) and (1) on that basis.

The Placement of Staus on a Performance Improvement Plan (PIP) and his Discharge

On May 14, 2013, Staus was called to Beaver's office, where Ondo and human resources representative Shannon Corcoran were also present. At this meeting, Beaver gave Staus a "Performance Improvement Plan Document" (PIP). (GC Exh. 187.) Beaver read the document aloud to Staus and told him that they were trying to help him. The PIP listed Staus' alleged performance deficiencies, which included products missing from his supply rooms, products stored in an incorrect manner,and the unit directors and clinicians in some departments not knowing Staus' name and not having his pager number. The PIP also noted that Staus had been observed taking excessive breaks. With respect to the goals and objectives of the PIP, the document indicated that Beaver and Ondo were to monitor Staus' units "looking for outages" and that they would review issues on a daily basis with Staus as they occur. It also indicated that Beaver and Ondo would determine if all of the regulatory protocols for storage were met and, if not, photographs would be shown to Staus. It further indicated that Staus was to meet with the directors of each unit and share his pager number with the clinical staff. It also instructed Staus to complete computer courses involving "Time Management" and "Basics of Effective Communication" and return the completed certificate for these courses to Beaver or Ondo by May 27, 2013. The PIP document also indicated that Beaver, Ondo, and Staus were to have a weekly meeting to discuss performance improvement and deficiencies. Finally, the PIP indicated that Staus' performance would be formally reviewed on the plan ending date, June 28, 2013, and that if Staus' performance improvement was not satisfactory, further action would be taken, up to and including termination.

Staus testified that he was not asked to explain anything about his job performance at this meeting and that he had not seen this action coming. Both Beaver and Ondo testified that at the end of the meeting, Staus testified that he understood and that he was going to "go putz around in his supply room." I do not credit the testimony of Beaver and Ondo on this point, as it appeared that they were attempting to portray Staus as indifferent to this action. I find this testimony to be implausible. Staus, an employee who had a good work record up until this point, had been given a document alleging that he had serious performance deficiencies that, if not corrected, could result in his termination. Staus' demeanor did not suggest to me that he would react to this situation in the flippant manner described by Beaver and Ondo.

Beaver and Ondo testified that prior to giving the PIP to Staus they had received numerous phone call complaints about his performance from unit directors, clinicians, and nurses. Beaver and Ondo also testified that in April 2013 they began to counsel Staus . Ondo testified that he worked with Staus in his supply rooms to show him what he was doing wrong.

According to Beaver, when the efforts to counsel Staus were unsuccessful, Beaver contacted Corcoran to discuss the next step. According to Beaver, Corcoran advised him to provide corrective coaching. Thereafter, Beaver and Ondo continued to counsel Staus about his deficiencies in maintaining his supply rooms.

Staus testified that he was not notified of any of complaints set forth in the PIP before it was given to him and that neither Beaver nor Ondo had expressed concerns to him about his job performance.

The testimony of Beaver and Ondo that they extensively counseled Staus prior to giving him the PIP is not corroborated by any documentary evidence. In this connection, there are no emails predating the PIP reflecting complaints regarding the job performance of Staus. In addition, there are no notes of any counseling sessions that either Beaver or Ondo had with Staus prior to giving him the PIP. At the hearing, Ondo conceded that putting an employee on a PIP is a "last resort." (Tr. 2276.) Thus, it would appear, before proceeding to the PIP stage, there would be some documentary evidence reflecting complaints regarding Staus and what steps were taken to correct any performance deficiencies. The lack of evidence corroborating the testimony of Beaver and Ondo in this regard convinces me that it is another attempt by them to overstate the performance deficiencies of Staus. Accordingly, I credit Staus' testimony that he was not advised of the alleged deficiencies in his performance and counseled regarding how to correct them before he was given the PIP.

Pursuant to the PIP, either Beaver or Ondo performed daily audits of Staus' supply rooms to determine whether the supply rooms for properly stocked and maintained in the appropriate fashion. (R. Exhs. 149–152, 154–156, 158–160, 162–165, 168–177). The daily audits were conducted in the afternoon after Staus had completed his work day. The daily audit report was dated on the date it was performed and listed the stock numbers used to order a product if the supply room was out of such a product. The daily audit reports contained in the record reflect that often Staus' supply rooms would be out of a number of items. For example, the daily audit for May 23, 2013 (R. Exh. 154), reflects that the supply rooms serviced by Staus were out of a total of 31 items. On May 28, Staus' supply rooms were out of 55 items, (R. Exh. 155); on May 31, 31 items were missing (R. Exh. 158); and on June 3, 63 items were missing (R. Exh. 159). Other daily audits reflected, however that between 10 to 20 items were missing and at least 1 day, May 29 (R. Exh. 156) no items were reported as missing. The morning after an audit either Beaver or Ondo would give Staus the daily audit report.

[49] Since the complaint does not allege that Respondent's solicitation and distribution policy is facially unlawful, I make no findings regarding the rule itself.

Also pursuant to the terms of the PIP, Staus met weekly with Ondo to discuss the issues set forth in the PIP. Beaver attended many these meetings but not all. These meetings lasted approximately 15 to 20 minutes. Before the meeting, Beaver or Ondo would give Staus an agenda of the items to be discussed regarding the manner in which Staus was performing his job and what steps should be taken to improve. (GC Exhs. 107–109, 189–192.)

The weekly agenda minute for June 5, 2013, contains a handwritten notation reflecting "retraining 6/5/13" after the printed question "What can we do to help improve?" Staus credibly testified that when he was asked if there was anything that Ondo or Beaver could do to help improve his performance Staus replied that he would take any training they had as he wanted to improve. Shortly thereafter, he worked with Ondo on two occasions. On the first occasion, Staus would prepare the order for one supply room and Ondo would prepare the order for another supply room and they then compared notes to see what, if anything, Staus was doing wrong. Staus testified that Ondo could not point out to him any problem with what Staus had done. On another day Ondo worked with Staus while he stocked his supply rooms. According to Staus, Ondo did not inform him of anything he was doing wrong and he did not observe Ondo perform the job in a different manner than he did.

Several of the weekly agendas contain references to "email from units." Staus was generally not provided information regarding these emails. At one meeting, however, Staus was provided with copies of emails that Gina Barry, the supervisor in unit 9D, had sent to Ondo and Beaver, indicating that her unit was getting low on supplies and, in some instances, had run out for an item. Staus testified that he discussed with Ondo how Barry had a tendency to exaggerate the status of her supplies, and that Ondo had agreed with him. Ondo did not refute this testimony and I credit Stuas' uncontradicted testimony on this point.

Staus credibly testified that because he had difficulty accessing the online courses on the hospital's computer, he was given additional time to complete the online courses by Ondo. Staus' testimony is corroborated by the agenda for the June 26, 2013 weekly meeting, signed by Ondo, which reflects that Staus had completed the courses by that date. (GC Exh. 192.) I do not credit the testimony of Beaver and Ondo that Staus was not given additional time to complete the online courses as the comments in the June 26, 2013 weekly agenda merely reflects that the courses were completed, not that they were completed late.

While there are some references to photographs in the weekly agendas, the only photographs that Staus was given during the period of the PIP were photocopies of four photographs provided to him at the June 12 meeting. (GC Exhs. 193a-d.) I find that Staus testified credibly regarding the photographs that were shown to him. With respect to General Counsel Exhibit 193a, at the hearing Staus identified it as a picture of a pallet on the loading dock that was not stacked properly Staus testified Ondo and Beaver told him that it was his pallet and should not be stacked like that, but that Staus had responded to them that because of the poor quality of the photograph he could not be certain it was his. There are no identifying marks on the photograph to clearly establish that the pallet was in fact stacked by Staus. Even if it was, however, it is only one photograph of a an allegedly improperly stacked pallet

General Counsel Exhibit 193b is a photograph of a cabinet in unit 9D, which Staus was responsible for. Staus acknowledged that the blood tubes pictured in the photograph were not stacked properly and told Beaver and Ondo that he would not have left them in that condition. According to Staus, they told him that it did not matter who did it but that he should just clean it up. With respect to General Counsel Exhibit 193b, the photograph was marked "6G," which is a unit that Staus is responsible for. Staus was told the photograph shows that there was an overstock of syringes. Staus reminded Ondo that he had spoken to him and asked him if he could leave the syringes there and at the time Ondo had replied that it was fine. According to Staus, Ondo replied that he thought that they were all going to be used that day.

With respect to the photograph depicted in General Counsel Exhibit 193d, Staus acknowledged that it showed an overstock of blood tubes. Staus testified that 6G is an ICU unit and the clinical personnel in that unit went through a lot of this item and that he would tend to overstock them on purpose because of that. Staus testified that he and other supply specialists would at times overstock items that they knew a unit would use a lot of, rather than not having enough. Strauss acknowledged, however, that the rule was that items should not be overstocked above the PAR.

On July 1, 2013, the Respondent terminated Staus in a meeting he attended with Beaver and Ondo. Staus was given a PIP conclusion document (GC Exh. 195) that states that there had been no improvements in keeping his supply rooms clean. The document also indicates "Paul Ondo and Ryan Beaver have taken many pictures of product residing in the wrong spot, bins being unkempt," and regulatory policies being ignored. With regard to communication, the PIP conclusion document states that while Staus met with unit directors, he had not communicated back to them "when they call for missing items." With respect to the ordering of items, the document indicated there had been no improvement and further states that Staus averaged at least 30 missing items at the end of each day and there had been days when he had been out of 60 items. The document also indicates that while Staus completed the "time management" computer course but there was no record of him completing the "Basics of Effective Communication."

According to Staus' credited testimony, there was no discussion about the PIP conclusion document when he was terminated and he was not given an opportunity to respond to the conclusion set forth in the document. After the document had been given to him and read by Beaver he was escorted from the facility by security. I do not credit the testimony of Beaver and Ondo that Staus laughed during this meeting. I find that, as with other parts of their testimony, this was an effort to support the Respondent's position that Staus was indifferent to his job at the hospital. I saw nothing in Staus' demeanor at the trial that would indicate that he saw any humor in being discharged from a job that he had held for 7 years.

Analysis

In applying the *Wright Line* analysis to the allegation that Staus was placed on a PIP and discharged in violation of Section 8(a)(3) and (1) of the Act, it is clear that Staus was an active and known union supporter. In this regard Staus wore union insignia that was observed by his direct supervisor. Staus had also distributed literature on behalf of the union at the facility and posted literature on a bulletin board. When questioned about whether he had distributed union material at the facility by Ondo, Staus readily admitted that he had done so.

I also find that the Respondent harbored animus toward the union activities of its nonclinical support employees based on the unfair labor practices that I find it committed. In addition, the Respondent harbored specific animus toward the union activities of Staus, the only open union supporter among the supply specialists. The Respondent demonstrated this animus by virtue of the unfair labor practices discussed above specifically directed to Staus' conduct in wearing union insignia and distributing and posting union material at the facility.

As noted above, on April 26, Ondo asked Staus if he had distributed union literature at the facility. Staus admitted that he had done so and resolutely told Ondo that it was his right to do so. Ondo told Strauss that it was against company policy to distribute union literature in the facility and that he would have to write him up for doing so. Ondo then prepared a verbal warning dated April 26, 2013, because of Staus' conduct in posting union materials in the break room and in the dock area. On May 14, 2013, Staus was placed on a PIP, approximately 3 weeks after he was unlawfully disciplined for distributing union literature on April 26, 2013. The timing of the placement of Staus on a PIP, shortly after Staus asserted his right to distribute union literature at the facility, is persuasive evidence that the Respondent's motive in placing Staus on a PIP was his union activity. *DHL Express, Inc.*, 360 NLRB 730, 736 (2014); *Toll Mfg. Co.*, 341 NLRB 832, 833 (2004). Based on the credited testimony of Staus, I find that he was not given any prior warning by either Ondo for Beaver that his work performance was considered to be deficient. Despite this lack of any prior warning, Staus was placed on a PIP which the Respondent views as a last resort in correcting employee deficiencies. This lack of any prior warning prior to being placed on a PIP is a further indication of a discriminatory motive.

Based on the foregoing, I find that the General Counsel has established a prima facie case under *Wright Line* that Staus' placement on a PIP and his discharge pursuant to the PIP was discriminatorily motivated and the burden shifts to the Respondent to establish that would have taken the same action against Staus in the absence of his union activities.

The Respondent contends that Staus was placed on a PIP and ultimately terminated because the new management team of Beaver and Ondo concluded that he did not meet the requirements of his position. In assessing the Respondent's defense, I found particularly probative the credible testimony of Sean Matulevic, who was called as a witness by the General Counsel. At the time of the hearing, Matulevic was employed as a supply specialist at Presbyterian Hospital and had worked there since May 2011. Matulevic worked with Staus and was supervised by Ondo and Beaver. While Staus was off from work because his knee surgery from December 2012 to February 2013, Matulevic supplied the supply rooms in units 6F and 6G that were assigned to Staus upon his return to work. Matulevic testified that 6F and 6G are ICU units and would go through a lot of items. He testified that both units had two supply rooms supply rooms and that made ordering supplies somewhat more difficult because of the lack of space in each one. Matulevic testified that when he supplied unit 9D, another unit normally serviced by Staus, Matulevic noted that the clinical personnel in that unit went through a high volume of supplies. He also noted that the clinical personnel who used that supply room would often leave it in somewhat more disarray than supply rooms in other units. Matulevic also testified that when Ondo and Beaver instituted the new ordering system in March 2013, while he did not have a problem adjusting to it, some of the other supply specialists did. Specifically with respect to Staus, Matulevic testified that Staus did not keep his supply rooms as orderly as most of the supply specialists but that he was not the worst in that regard.

Gina Barry, the unit director of unit 9D, testified that Staus did not keep the supply room stocked during the period of time that he serviced her unit and that she had to constantly call for more supplies. Barry further testified that Staus' performance never improved during the time that he was the supply specialist assigned to her unit. While Barry's testimony regarding her request for more supplies is corroborated by emails that she sent to Ondo and Beaver, I have credited Staus' testimony that Ondo agreed with him that Barry would exaggerate the lack of supplies in her unit. Consequently, I do not assign much weight to this aspect of her testimony With regard to the portion of her testimony indicating that Staus' performance never improved, I find it to be conclusionary and I give it little weight.

Leslie Poston, the health unit coordinator in unit 9D, testified that when Staus finished stocking supply room in unit 9D it was clean, but within hours after being used by the unit personnel, it would be in disarray. She also testified that employees from other units would also ask to take supplies from unit 9D when they had run out. Poston testified that during the time that Staus supplied the unit 9 supply room, no one had complained to her about a lack of necessary supplies. Poston's testimony regarding the fact that the supply room in unit 9D would often become somewhat messy throughout the afternoon is corroborated by Matulevic's testimony. The fact is, however, that it is the responsibility of a supply specialist to maintain a degree of order in the manner in which materials are stored. While no one may have complained to Poston about the lack of necessary supplies while Staus serviced the supply room in unit 9D, her supervisor Barry, did in fact make some complaints in this regard. Accordingly, I find Poston's testimony regarding Staus' job performance to have limited probative value.

In support of its position that it relied on nondiscriminatory considerations in placing Staus on a PIP and ultimately discharging him, the Respondent relies on the fact that it placed supply specialist Matthew Schmidt on a PIP on October 14, 2013. Schmidt's PIP indicates that his performance deficiencies involved a significant amount of missing product. In this regard, the PIP noted that after the Respondent began to audit Schmidt's supply rooms on September 11, he was out of 48

items in 10 locations. The PIP also noted that Schmidt stored products in a manner that was not in accordance with the regulatory guidelines. Beaver testified that Schmidt was terminated during the PIP because of an attendance infraction which automatically results in the termination of an employee on a PIP. While the placement of Schmidt on a PIP for issues similar to that involving Staus is supportive of the Respondent's defense, the fact that it occurred approximately six months after Staus was placed on a PIP, and an unfair labor practice charge was filed, lessens its evidentiary value. In addition, the fact that Schmidt was ultimately terminated for attendance rather than his performance is also a distinguishing factor from Staus' situation.

The Respondent also relies on the fact that Theresa Thompson, a supply specialist at UPMC Hamot in Erie, Pennsylvania, was placed on a PIP in February 2013. (R. Exh. 411.) I note that in the instant proceeding, the Respondent denies that it is a single employer with UPMC, but nonetheless contends that the placement of Thompson on a PIP in another hospital affiliated with UPMC supports its position that the action taken against Staus was nondiscriminatory. While Beaver did not directly supervise Thompson he had some involvement with the "documentation" of the PIP (Tr. 1948.) Thompson's PIP reveals that her performance deficiencies involved incorrectly storing products. The PIP also notes that because Thompson did not follow the established guidelines for scanning the items in the supply closets, and this led to items being out of stock in multiple "par locations." Finally, the PIP reflects that Thompson failed to follow directions given by management and relied on previous practices that were contrary to current policies. Prior to the completion of her PIP, Thompson was discharged because of an attendance violation. Since Thompson did not work at Presbyterian Hospital, I find that her placement on a PIP has limited value in assessing the placement of Staus on a PIP and his ultimate discharge. For example, there is no record evidence indicating that at the UPMC Hamot facility the placement of an employee on a PIP is considered to be a last resort as it is at Presbyterian Hospital.

The Respondent also relies on the fact that Mary Fisher, who was employed as a supply team lead in the UPMC Hamot facility in Erie, Pennsylvania, was placed on a PIP on May 7, 2012, and terminated at the conclusion of that plan on June 25, 2012. The PIP conclusion document reflects that Fisher was unable to demonstrate leadership qualities to the staff that she was responsible for. The document also notes that Fisher did not improve in providing accurate information to other hospital employees and she did not utilize the standard inventory practices, but rather created her own procedure that was proven to be ineffective in managing the inventory. As with Thompson, the fact that Fisher did not work at Presbyterian Hospital, but at another facility related to UPMC, lessens the value of this evidence. In addition, Fisher held a different position, team leader, from that of Staus and was terminated because of an inability to communicate and implement the facility's procedures. Thus, I find Fisher's placement on a PIP and her discharge for failing to meet the requirements set forth in her PIP to involve circumstances substantially different than those involving Staus.

The General Counsel and the Union contend that the Respondent's treatment of supply specialist Barbara Mathis establishes that the Respondent treated Staus in a disparate manner. In this regard, they argue that Mathis had similar documented performance problems to those of Staus but was never placed on a PIP or subject to any discipline. Mathis was a supply specialist at Presbyterian Hospital at the same time that Staus was employed. Beaver testified that because of concerns about Mathis' performance, she was subject to daily audits for several months beginning on June 12, 2013. The daily audit for June 17, 2013, reflects that there were "complaints from Units that they were "consistently out of items." This document also reflects that other rooms were overstocked and that there were items stored on the floor and overflowing product was coming out of bins. (GC Exh. 91, p. 4.) During the period between July 18, and September 23, 2013, Ondo received email complaints from approximately 5 unit directors whose supply rooms were stocked by Mathis. The complaints included supply rooms being in disarray, overstocked items and missing items. (GC Exh. 91, pp. 7–10, 13.) The daily audit for September 17 reveals that the areas serviced by Mathis were out of 54 items, that rooms needed to be cleaned and that there were broken bins and dividers. (GC Exh. 91, p. 12.) On September 18, the rooms supplied by Mathis were out of 31 items, some rooms had overstock and rooms needed to be "straightened out." On September 25, the supply rooms stocked by Mathis were out of 51 items and rooms needed to be cleaned and overstock removed. (GC Exh. 91, p.14.) Beaver testified that Mathis was never placed on a PIP because she responded well to coaching.

As I have noted previously in this decision, in order to meet its burden under *Wright Line*, an employer must establish that it has consistently and evenly applied its disciplinary policies. *DHL Express, Inc*., supra; *Septix Waste, Inc*., 346 NLRB 494, 495–496 (2006.)

The Respondent has placed one other employee, Schmidt, on a PIP for performance related problems similar to those of Staus but this action occurred after Staus was placed on a PIP and ultimately discharged for allegedly not improving his performance. As I have noted above, however, the Respondent's action toward Schmidt occurred several months after the placement of Staus on a PIP and therefore I give it less weight to conduct that occurred before or during this same period that Staus was evaluated. Moreover, Schmidt was ultimately discharged for having an occurrence during the period he was on the PIP, which resulted in his automatic discharge. Thus, the circumstances of his discharge is not comparable to that of Staus, since he was not discharged for failing to complete the requirements set forth in the PIP.

The placement of employees Thompson and Fisher on PIPs is distinguishable from Staus' situation as they occurred at a different facility than the Respondent. In addition, Fisher held a different position, supply lead, and was placed on a PIP ultimately discharged because of her inability to effectively demonstrate leadership and communication skills.

I find that the evidence establishes that the Respondent treated Staus in a disparate fashion from Mathis. Both employees held the same position contemporaneously. Shortly after Staus engaged in open union activity, he was placed on a PIP, without receiving prior counseling and was then discharged for alleged-

ly failing to improve his performance. Mathis, on the other hand, was closely monitored from June to September 2013, and at the end of that period was still having the same performance related problems of missing products, overstocked items and disorderly supply rooms. While Beaver claims that Mathis was not placed on a PIP because she responded well to coaching, the objective evidence described above establishes that his testimony in this regard is not credible. While the objective evidence establishes that Staus had performance related issues, they were similar to those involving Mathis, but he was treated in a much different fashion. Under the circumstances, I find that the Respondent has not met its burden under *Wright Line* to establish that it would have placed Staus on a PIP absent his union activity. Accordingly, I find that his placement on a PIP violates Section 8(a)(3) and (1) of the Act.

With respect to his discharge, the evidence described above establishes that the Respondent has not discharged any other supply specialist for performance related problems. Rather, the evidence indicates that the Respondent tolerated similar performance from Mathis without the imposition of any disciplinary action. Accordingly, I find that the Respondent's discharge of Staus also violates Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by

(a) Denying nonemployee organizers access to its cafeteria by causing the police to remove them while permitting other visitors and guests of hospital personnel to use the cafeteria.

(b) Engaging in the surveillance of conversations and meetings between employees and union organizers.

(c) Engaging in the surveillance of employees meeting with union organizers by requiring employees to produce identification.

(d) Discriminatorily prohibiting employees from wearing union insignia in patient care areas while permitting employees to wear insignia regarding other entities not related to the hospital in patient care areas.

(e) Prohibiting employees from wearing union insignia in nonpatient care areas.

(f) Discriminatorily prohibiting employees from posting union materials on its bulletin boards while allowing the ESS employee council to post materials on its bulletin boards.

(g) Coercively interrogating employees regarding their union activities.

(h) Threatening to discipline employees for refusing to participate in an unlawful interrogation.

(i) Impliedly threatening an employee with a poor evaluation because of her union activities.

(j) Instructing employees they were not allowed to post any union materials on bulletin boards.

(k) Coercively requiring employees to write a statement regarding their union activities.

(l) Demanding employees' consent to be photographed and photographing employees engaged in union activity without proper justification.

(m) Coercively informing an employee that the manner in which she solicited statements from employees during its internal grievance process was the reason a warning had been rescinded.

2. The Respondent has engaged in an unfair labor in violation of Section 8(a)(2) and (1) of the Act, by dominating, interfering with the formation and administration of, and rendering unlawful assistance in support to the ESS employee council.

3. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by

(a) Issuing a final written warning to Felicia Penn because of her union activity.

(b) Suspending and issuing a final written warning to Leslie Poston because she used its email system to send a union related message.

(c) Discharging Finley Littlejohn because of his union activities

(d) Issuing a final written warning and discharging Albert Turner because of his union activities

(e) Issuing a verbal and written warning to James Staus, placing him on a Performance Improvements Plan (PIP) and discharging him because of his union activities..

4. The Respondent has engaged in unfair labor practices in violation of Section 8(4), (3), and (1) of the Act by.

(a) Discharging Ronald Oakes because of his union activities and because he was named in a prior unfair labor practice charge

(b) Issuing a final written warning to Chaney Lewis because of his union activities and because he was named in a prior unfair labor practice charge.

5. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

6. The Respondent has not otherwise violated the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

I order that the Respondent withdraw all recognition and completely disestablish the ESS employee council and refrain from recognizing it, or any successor, as a representative of any of the Respondent's employees for the purpose of dealing with the Respondent concerning terms and conditions of employment.

The Respondent, having discriminatorily discharged Ronald Oakes, Albert Turner, Finley Littlejohn, and James Staus, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

The Respondent, having discriminatorily suspended Leslie Poston must make her whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* supra.

I shall order the Respondent to compensate the above-named employees for the adverse tax consequences, if any, of receiving lump sum backpay awards and to file a report with the Social Security Administration allocating backpay awards to the appropriate calendar quarters for each employee. *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014).

In the complaint the General Counsel sought the following additional remedies for any unfair labor practices I may find in this proceeding: (a) a 120-day notice posting period; (b) a reading of the notice "at a meeting or meetings of UPMC Presbyterian Shadyside employees, scheduled to ensure the widest possible employee attendance, during working hours in the presence of the Board agent."; (c) grant the Union access to public areas in the UPMC Presbyterian Shadyside facilities with the right to speak to employees during employees' non-working time; and (d) "[d]uring the period that the NLRB Notice to Employees is posted in connection with this proceeding, allow current employees to post Union literature and notices on its bulletin boards and all places where notices to employees are customarily posted within Respondent's UPMC Presbyterian Shadyside facilities." In their briefs, the General Counsel and the Union argue in support of these additional remedies, while the Respondent opposes the imposition of any additional remedies beyond those usually provided for.

I deny the General Counsel's request for 120-day notice period as neither the General Counsel Union nor the Union has provided any authority for extending the Board's traditional 60 day notice posting period.

In considering the other special remedies sought by the General Counsel, I note that the Board has held that in determining whether additional remedies are necessary to fully dissipate the coercive effect of unlawful discharges and other unfair labor practices it has broad discretion to fashion a remedy to fit the circumstances of each case. *Pacific Beach Hotel*, 361 NLRB 709, 710–711 (2014); *Excel Case Ready,* 334 NLRB 4, 5 (2001). In this regard, the Board has held that a public reading of the notice is an "effective but moderate way to let in a warming wind of information, and more important, reassurance." *Federated Logistics & Operations,* 340 NLRB 255, 256 (2003) citing *J.P. Stevens & Co. v. NLRB*, 417F.2d 533, 539–540 (5th Cir. 1969). In the instant case, I find that the unfair labor practices of the Respondent justify the additional remedy of a notice reading. The Respondent responded to the Union's organizing campaign with extensive and serious unfair labor practices. In the first instance, the Respondent has engaged in numerous violations of Section 8(a)(1) of the Act. As part of its campaign in opposing the Union, and in order to dissuade employees from supporting it, the Respondent formed and dominated the ESS employee council in violation of Section 8(a)(2) and (1) of the Act. In addition, the Respondent discharged four employee supporters of the Union, including three of the most visible, Oakes, Turner, and Staus. The Board has noted that the unlawful discharges of union supporters are highly coercive and that is particularly true when employee leaders of the union movement have been terminated. *Excel Case Ready*, supra at 5.

While the potential unit of nonclinical support employees that the Union is attempting to organize is large, approximately 3500 employees, the Board has granted a notice reading remedy when serious unfair labor practices have been committed in a relatively large unit. In this connection, the Board granted a notice reading remedy in *Audubon Regional Medical Center*, 331 NLRB 374 (2000). In that case, the union was seeking to represent a unit of approximately 650 employees. During the union's campaign, the employer engaged in several violations of Section 8(a)(1) and discharged one employee and denied three other employees certain positions in violation of Section 8(a)(3) and (1) of the Act. Given the seriousness of the of the Respondent's unfair labor practices in the instant case, which were committed in several different departments, I find that a reading of the notice to the employees the Union is seeking to organize, the Respondent's nonclinical support employees, will serve to appropriately ameliorate the lasting impact of the Respondent's coercive conduct.

As noted above, I have broad discretion in terms of fashioning an appropriate remedy. Although the General Counsel did not specifically request a broad order as a remedy, I find that the Respondent has engaged in such egregious and widespread misconduct so as to demonstrate a general disregard for employees' statutory rights and I will therefore issue a broad order requiring the Respondent to refrain from violating the Act "in any other manner," instead of a narrow order to refrain from engaging in conduct violative of the Act "in any like or related manner." *Hickmott Foods*, 242 NLRB 1357 (1979). The Board has noted that a broad order can be appropriate even when a respondent has not been shown to have committed prior violations of the Act, when the conduct engaged in is egregious or widespread. *Federated Logistics & Operations*, supra at 258 fn. 9.

I find that my order that the notice be read to the Respondent's nonclinical support employees and the issuance of a broad order are sufficient special remedies to address the unfair labor practices that occurred herein. Accordingly, I deny the General Counsel's request that the Union be given access to public areas in the Respondent's facilities with the right to speak to employees during their nonworking time. The Board has typically granted such a remedy in circumstances different than those present in the instant case. For example, while the Board granted such a remedy in *United States Service Industries, Inc.*, 319 NLRB 231 (1995), the employer in that case was a third time recidivist with a long history of opposition to the statutory rights of its employees. In *Audubon Regional Medical Center*, supra, the Board imposed such a remedy, in addition to other special remedies, in lieu of granting a bargaining order under *NLRB v. Gissel Packing Co*., 395 U.S. (1969), and in conjunction with a direction of a second election.

I also deny the General Counsel's request that during the notice posting current employees be permitted to post union literature and notices on bulletin boards and in all places where notices are customarily posted. Given the notice reading remedy and broad order I am ordering in this case, I do not believe this additional special remedy is warranted under the circumstances present here. While such a remedy was granted in *United States Service Industries*, supra, as noted above, that case involved a serial recidivist. In *Excel Case Ready*, the Respondent committed egregious unfair labor practices, including the discharge of 3 employees, in a relatively small unit of 32 employees which

exacerbated the effect of those unfair labor practices. In *Blockbuster Pavilion*, 331 NLRB 1274 (2000), this special remedy, in addition to others, was imposed in lieu of granting a *Gissel* bargaining order.

While I have found that the Respondent has discriminatorily applied its bulletin board policy, I find that, under the circumstances of this case, the Board's traditional remedy for such a violation is sufficient, as modified by the Board's analysis in *Register Guard I*, supra. See *Vons Grocery Co*., 320 NLRB 53, 57 (1995), and *Honeywell, Inc*., 262 NLRB 1402, 1403 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[50]

ORDER

The Respondent, UPMC Presbyterian Shadyside Hospital, Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Denying nonemployee organizers access to its cafeteria by causing the police to remove them while permitting other visitors and guests of hospital personnel to use the cafeteria.

(b) Engaging in the surveillance of conversations and meetings between employees and union organizers.

(c) Engaging in the surveillance of employees meeting with union organizers by requiring employees to produce identification.

(d) Discriminatorily prohibiting employees from wearing union insignia in patient care areas while permitting employees to wear insignia regarding other entities not related to the hospital in patient care areas.

(e) Prohibiting employees from wearing union insignia in nonpatient care areas.

(f) Discriminatorily prohibiting employees from posting union materials on its bulletin boards while allowing the ESS employee council to post materials on its bulletin boards.

(g) Coercively interrogating employees regarding their union activities.

(h) Threatening to discipline employees for refusing to participate in an unlawful interrogation.

(i) Impliedly threatening an employee with a poor evaluation because of her union activities.

(j) Instructing employees they were not allowed to post any union materials on bulletin boards.

(k) Coercively requiring employees to write a statement regarding their union activities.

(l) Demanding employees' consent to be photographed and photographing employees engaged in union activity without proper justification.

(m) Coercively informing an employee that the manner in which she solicited statements from employees during its internal grievance process was the reason a warning had been rescinded.

(n) Forming, dominating, and rendering unlawful assistance to the ESS employee Council, or any other labor organization

(o) Issuing verbal or written discipline to its employees, suspending its employees, placing its employees on a Performance Improvement Plan (PIP), or discharging its employees for engaging in union activities

(p) Issuing written discipline or discharging its employees because they were named in an NLRB charge or participated in a Board proceeding.

(q) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw recognition from and completely disestablished the ESS employee council, and refrain from recognizing the ESS employee council, or any successor thereof, as representative of any of its employees for the purpose of dealing with the Respondent concerning terms and conditions of employment.

(b) Within 14 days from the date of the Board's Order, offer Ronald Oakes, Albert Turner, Finley Littlejohn, and James Staus full reinstatement to their former jobs or, if those jobs no longer exists, to a substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Ronald Oakes, Albert Turner, Finley Littlejohn, James Staus, and Leslie Poston whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Compensate Ronald Oakes, Albert Turner, Finley Littlejohn, James Staus, and Leslie Poston for the adverse tax consequences, if any, of receiving a lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges of Ronald Oakes, Albert Turner, and Finley Littlejohn, and within 3 days thereafter notify these employees in writing that this has been done and that the discharge will not be used against them in any way.

(f) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful placement on a PIP and discharge of James Staus and within 3 days thereafter notify the him in writing that this has been done and that his placement on a PIP and discharged will not be used against him in any way.

(g) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspension and written warning given to Leslie Poston and within 3 days thereafter notify her in writing that this has been done and that the suspension and written warning will not be used against her in any way.

(h) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful verbal and written warnings issued to Felicia Penn, Chaney Lewis, Albert Turner, and James Staus and within 3 days thereafter notify the

[50] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

in writing that this has been done and that the written warnings will not be used against them in any way.[51]

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its facilities in Pittsburgh, Pennsylvania, copies of the attached notice marked "Appendix."[52] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 21, 2013.

(k) During the time the notice is posted, convene the nonclinical support employees, during working time at the Respondent's Pittsburgh, Pennsylvania facility, by shifts, departments, or otherwise, and have a responsible management official of the Respondent read the notice to employees or permit a Board agent, in the presence of a responsible management official of the Respondent, to read the notice to employees.

(l) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. November 14, 2014.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT deny nonemployee organizers of the SEIU Healthcare Pennsylvania, CTW, CLC, or any other union, access to our cafeteria by causing the police to remove them while permitting other visitors and guests of hospital personnel to use the cafeteria.

WE WILL NOT engage in the surveillance of conversations and meetings between employees and union organizers.

WE WILL NOT engage in the surveillance of employees meeting with union organizers by requiring employees to produce identification.

WE WILL NOT discriminatorily prohibit employees from wearing union insignia in patient care areas while permitting employees to wear insignia regarding other entities not related to the hospital in patient care areas.

WE WILL NOT prohibit employees from wearing union insignia in nonpatient care areas.

WE WILL NOT discriminatorily prohibit employees from posting union materials on our bulletin boards while allowing the ESS employee council to post materials on our bulletin boards.

WE WILL NOT coercively interrogating employees regarding their union activities.

WE WILL NOT threaten to discipline employees for refusing to participate in an unlawful interrogation.

WE WILL NOT impliedly threaten an employee with a poor evaluation because of her union activities.

WE WILL NOT instruct employees that they are not allowed to post any union materials on bulletin boards.

WE WILL NOT coercively require employees to write a statement regarding their union activities.

WE WILL NOT demand employees' consent to be photographed and photograph employees engaged in union activity without proper justification.

WE WILL NOT coercively inform an employee that the manner in which she solicited statements from employees during our internal grievance process was the reason a warning had been rescinded.

WE WILL NOT form, dominate, and render unlawful assistance to the ESS employee council, or any other labor organization.

WE WILL NOT issue verbal or written warnings to our employees, suspend our employees, place our employees on a Performance Improvement Plan (PIP), or discharge our em-

[51] While the Respondent rescinded the written warnings issued to several employees, the Respondent either gave no reason or unclear reasons as to why the warnings were rescinded. I believe it is necessary to have the written warnings rescinded pursuant to this decision and order so that employees are made expressly aware that the warnings were unlawful and were rescinded through operation of law.

[52] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ployees for engaging in union activities.

WE WILL NOT issue written warnings or discharge our employees because they were named in an NLRB charge or participated in a Board proceeding.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL withdraw recognition from and completely disestablish the ESS employee council, and refrain from recognizing the ESS employee council, or any successor thereof, as a representative of any of our employees for the purpose of dealing with us concerning terms and conditions of employment.

WE WILL within 14 days from the date of the Board's Order, offer Ronald Oakes, Albert Turner, Finley Littlejohn, and James Staus full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Ronald Oakes, Albert Turner, Finley Littlejohn, James Staus, and Leslie Poston whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

WE WILL compensate Ronald Oakes, Albert Turner, Finley Littlejohn, James Staus and Leslie Poston for the adverse tax consequences, if any, of receiving a lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Ronald Oakes, Albert Turner, and Finley Littlejohn, and within 3 days thereafter notify these employees in writing that this has been done and that the discharge will not be used against them in any way.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful placement on a PIP and discharge of James Staus and within 3 days thereafter notify him in writing that this has been done and that his placement on a PIP and discharge will not be used against him in any way.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and written warning given to Leslie Poston and within 3 days thereafter notify her in writing that this has been done and that the suspension and written warning will not be used against her in any way.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful verbal and written warnings issued to Felicia Penn, Chaney Lewis, Albert Turner, and James Staus and within 3 days thereafter notify them in writing that this has been done and that the warnings will not be used against them in any way.

UPMC PRESBYTERIAN SHADYSIDE

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/06-CA-102465 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.